IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WALTER D. ACKERMAN, JR., individually and as Attorney General of the Territory of Hawaii, and JEAN LANE, individually and as Chief of Police of the County of Maui,

Appellants,

vs.

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, a Voluntary Unincorporated Association and Labor Union, et al.,

Appellees.

No. 12300

WALTER D. ACKERMAN, JR., individually and as Attorney General of the Territory of Hawaii,

Appellant,

vs.

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, a Voluntary Unincorporated Association and Labor Union, et al.,

Appellees.

No. 12301

Upon Appeal from the United States District Court for the District of Hawaii.

APPELLANTS' OPENING BRIEF

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APPELLANTS' OPENING BRIEF

JURISDICTIONAL STATEMENT

These are appeals pursuant to section 1291 of the new judicial code from final decisions of the United States District Court for the District of Hawaii, made and entered March 29, 1949, in two cases, Civil No. 828 in that court which in this Court is No. 12300 (decree, R. 543-550),[1]

[1] Unless otherwise indicated, references to the record are to the record in No. 12300, or to the consolidated record in Nos. 12300-12301, the paging of which follows consecutively the paging in volume I of the record in No. 12300. Where the reference is to volume I of the record in No. 12301 (which for that case precedes the consolidated record) the reference used is as follows: "No. 12301, R. ....."

and Civil No. 836 in that court which in this Court is No. 12301 (decree, No. 12301, R. 89-96).[1] The notices of appeal were filed April 26, 1949 (R. 550-551; No. 12301, R. 97), pursuant to section 2107 of the new judicial code.

The actions were brought by the respondents to obtain (R. 2-24, 104-106, No. 12301, R. 2-34), and the respondents did obtain (R. 543-550; No. 12301, R. 89-96), injunctions against the continuance of four criminal prosecutions then pending in the circuit court of the Territory of Hawaii, Second Judicial Circuit, one for riot and conspiracy, Criminal No. 2365 (No. 12301, R. 28), and three for riot, Criminal No. 2412 (R. 88), Criminal No. 2413 (R. 93), and Criminal No. 2419 (R. 138). The district court held that it acted as a specially constituted statutory three-judge court under sections 2281 and 2284 of the new judicial code (formerly judicial code section 266, 28 U.S.C. 380) "or in the alternative, if these provisions be inapplicable in the United States district court for the district of Hawaii, then as the United States district court for the district of Hawaii comprised of three judges sitting en banc." (Decree, R. 546, No. 12301, R. 93; opinion, R. 413-439, 82 F. Supp. 65, 86).

Inherent in the question of the jurisdiction of this Court is the question whether the district court was a specially constituted statutory three-judge court, whose decrees should be directly appealed to the Supreme Court of the United States pursuant to section 1253 of the new judicial code. That the district court was not a statutory three-judge court, that section 1253 does not apply, and that this Court has appellate jurisdiction appears from the opinion of the Supreme Court of the United States in *Stainback* v. *Mo Hock Ke Lok Po,* 336 U.S. 368, 377-381, decided March 14, 1949 after the opinion was rendered in these cases. The Supreme Court held Congress did not intend that the burden placed on the functioning of the federal judicial system by the three-judge court provisions should be under-

taken where enactments of a territorial legislature were involved.

Since a statutory three-judge court was not properly called for the district of Hawaii, there is no direct appeal to the Supreme Court of the United States and the usual appeal lies to this Court. *Stainback* v. *Mo Hock Ke Lok Po, supra; Healy* v. *Ratta,* 289 U.S. 701, 292 U.S. 263, 264, 67 F. 2d 554, 556; *Wilentz* v. *Sovereign Camp,* 306 U.S. 573, 582; *Commission* v. *Brashear Lines,* 312 U.S. 621, 626.

STATEMENT OF THE CASE

A. No. 12301

This case was commenced December 31, 1947, four weeks after No. 12300, but because No. 12301 arose first in point of time in the territorial courts, the subject matter thereof will be set forth first.

Proceedings in territorial courts. On October 16, 1946, at Paia, Island of Maui, County of Maui, Territory of Hawaii, during the sugar strike of September 1-November 19, 1946,[2] occurred the incident which occasioned in the circuit court of the Second Judicial Circuit of the Territory of Hawaii[3] a criminal prosecution, Criminal No. 2365. A complaint was sworn to on October 19, 1946 (R. 1282), followed by arrests. On October 30, 1946, the territorial grand jury for the Second Judicial Circuit returned an indictment for riot and unlawful assembly, a felony, against seventy-eight persons (R. 1240-1247). These seventy-eight persons, seventy-four of whom were plaintiffs in the court below, represented by Mrs. Harriet Bouslog, their attorney, and also their attorney in the court below, filed a plea to this indictment, entitled "Demurrer or Motion to Quash."

[2] The strike continued at one company, Pioneer Mill Company, Lahaina, until January 2, 1947 (R. 391, note 15).

[3] The Second Judicial Circuit is coincident with the County of Maui.

The plea was overruled, and pursuant to section 9531 of the Revised Laws of Hawaii 1945 Circuit Judge Cable Wirtz permitted an interlocutory appeal from his ruling to the Supreme Court of Hawaii. The case was submitted in that court on October 28, 1947 and decided November 26, 1947, being the case of *Territory* v. *Kaholokula,* 37 Haw. 625. In an opinion by Mr. Justice Peters the Supreme Court construed the criminal statute and upheld its constitutionality. The court further held that all three counts of the indictment were fatally defective in form, for failure to specify the particulars of the conduct which struck or tended to strike terror into others. "Acts which strike or tend to strike terror into others are essential ingredients of the offense of riot," said the Supreme Court (37 Haw. at p. 642).

On December 2, 1947, the territorial grand jury for the Second Judicial Circuit returned a second indictment in Criminal No. 2365 against seventy-four of the original defendants, plus one other, Masao Sera (No. 12301, R. 28-34). The indictment contained two counts, a first count for riot, and a second count for conspiracy, third degree. The count for riot differed from the earlier indictment, found fatally defective by the Supreme Court, in that it was specified that there were assaults against the victims of the riot, and the nature thereof. It was charged in the second count for conspiracy, third degree, that these seventy-five persons conspired to commit acts of violence against and inflict corporal injuries upon the said victims. Thus this second count charged conspiracy to commit criminal offenses (R. 401).

The first indictment was returned by the 1946 grand jury and the second indictment by the 1947 grand jury. Neither has been challenged by the defendants in Criminal No. 2365, individual plaintiff-appellees in No. 12301, and there has been no plea to the second indictment. There

was a challenge to the 1947 grand jury presented by the defendants in Criminal Nos. 2412, 2413, and 2419, individual plaintiff-appellees in No. 12300; by the complaint in No. 12301 plaintiffs endeavored to adopt and incorporate this other record and have it reviewed by the court below (No. 12301, R. 20-22).

Proceedings in the court below; parties. On December 31, 1947, the complaint in No. 12301, Civil 836 in the court below, was filed in the United States district court for the district of Hawaii, by the seventy-five defendants in Criminal No. 2365, seventy-four of whom had already obtained an adjudication of the constitutionality of the riot statute by the Supreme Court of Hawaii, as above stated. Added plaintiffs were the International Longshoremen's and Warehousemen's Union (hereinafter called the Union or the ILWU) and Antonia T. Rania, president of ILWU Local 142 (United Sugar Workers) suing as a class representative. The defendants were the Attorney General, appellant herein; the then County Attorney and Deputy County Attorney who though no longer in office when the decree was entered the court refused to dismiss[4] and who also have appealed to this Court (R. 551; No. 12301, R. 97); and the Governor, Judge of the second judicial circuit of the Territory, Jury commissioners, and members of the 1947 territorial grand jury for the second judicial circuit, who were dismissed by the court below at the end of the case (R. 515-517, 547; No. 12301, R. 93-94).

Same; plaintiffs' complaint. The jurisdiction of the United States district court was alleged to be founded on the Civil Rights Act, cited in the complaint as 8 United States Code sections 41, 43, 44 and 46; sections 24 (1) and 24 (14) of the old judicial code, cited in the complaint as 28 United States Code sections 41 (1) and 41 (14); and

[4] Point XII, *infra*.

Amendments I, V, VI, XIV and XIX of the Constitution of the United States. A three-judge court was requested and section 266 of the old judicial code was invoked (No. 12301, R. 10). The complaint attacked as contrary to the Constitution and statutes of the United States, the unlawful assembly and riot statute and the conspiracy statute of the Territory, and attacked the legality of the 1947 territorial second circuit grand jury, as constituted (No. 12301, R. 13-20). It prayed that the court so adjudicate, and that the attorney general, and county attorney and his deputy, be enjoined from proceeding further in connection with the pending indictment (No. 12301, R. 25-26).

This matter is continued under part C, *infra*.

B. No. 12300

This case was commenced December 1, 1947.

Proceedings in territorial courts. On July 14, 1947, at Kaumalapau Wharf, Island of Lanai, County of Maui, during the pineapple strike of July 10-July 15, 1947, occurred the incident which occasioned two criminal prosecutions, Criminal Nos. 2413 and 2419. This incident is referred to by the court below as one of the Lanai incidents, but as there are two incidents on Lanai, this one and the Kalua incident of July 15, 1947 involved in Criminal No. 2412, it will be more convenient to refer to this one as the Kaumalapau Wharf incident. All three criminal complaints, Criminal Nos. 2413, 2419, and 2412, charged acts of beating, striking, and infliction of corporal injuries upon persons therein named (R. 93-94, 139-140, 88).

As a result of the Kaumalapau Wharf incident eleven persons were committed by the district court of Lanai to the circuit court of the second judicial circuit of the Territory of Hawaii, Criminal No. 2413. They were committed to await the action of the grand jury on a criminal com-

plaint made July 16, 1947, they having waived preliminary examination (R. 93-97). This criminal complaint is the same as exhibit D attached to the complaint herein (R. 22-23). In Criminal No. 2419, also based on the Kaumalapau Wharf incident, the complaint was made and warrants were issued on August 1, 1949. After a preliminary hearing on August 22, 28, 29, and 30, the Lanai district court took the matter under advisement and on September 16, 1947, the thirty-six persons who are plaintiffs in the present case were committed for grand jury action (R. 138-323). This Criminal No. 2419 was not included in the original complaint below, but was added to it by stipulation (R. 104-106).

On July 15, 1947, the day after the Kaumalapau Wharf incident, there occurred, also on the Island of Lanai, the incident which occasioned Criminal No. 2412, referred to as the Kalua incident. As a result of the Kalua incident five persons were committed by the district court of Lanai to the circuit court of the second judicial circuit, Criminal No. 2412. They were committed to await the action of the grand jury, after having waived preliminary examination (R. 88-93). The criminal complaint was made July 15, 1947 and is the same as exhibit E attached to the complaint herein (R. 23-24).

The defendants in Criminal Nos. 2412 and 2413, plaintiffs below, on July 29, 1947, filed challenges to the grand jury of the second judicial circuit,[5] which were heard by a substitute judge, the Honorable A. M. Cristy, the second circuit judge having disqualified himself by reason of being

[5] The defendants in Criminal No. 2419, plaintiffs below, had not been committed for grand jury action when the challenges were heard, but as they were involved in the same incident as those in Criminal No. 2413 and their cases were before the district magistrate's court for commitment, it was anticipated when the challenges were heard that they would join in the challenges, and it was stipulated in the court below that they may be deemed to have done so (R. 339, par. 6).

a jury commissioner; on September 18, 1947, after a considerable hearing these challenges were denied (R. 59-87, 567-1082).

At the time when the grand jury challenges were disposed of the unlawful assembly and riot statute was before the Supreme Court of Hawaii in the *Kaholokula* case involved in No. 12301. Therefore Criminal Nos. 2412, 2413 and 2419 were held awaiting the opinion of the court, which as above noted was given on November 26, 1947, upholding the constitutionality of the statute. These cases were to come before the grand jury on December 2, 1947. On December 1, 1947 at 7:00 p.m. for the purpose of preventing the grand jury from proceeding at 9:00 a.m. the following morning, there was issued an ex parte temporary restraining order on the grounds of alleged illegal composition of the grand jury and alleged invalidity of the unlawful assembly and riot statute; this ex parte order was issued on a complaint and affidavit plainly showing that the grand jury issues had been adjudicated by the parties concerned and the Unlawful Assembly and Riot Act had been upheld by the Supreme Court of Hawaii in the *Kaholokula* case (R. 11, 24, 26-29). By reason of the temporary restraining order preventing the grand jury from acting before it went out of office (R. 1085-1096) the grand jury issue became moot (see paragraph 4 of the decree, R. 547).

Proceedings in the court below; parties. On December 1, 1947, the complaint in No. 12300 was filed in the United States district court for the district of Hawaii by the eleven defendants in Criminal No. 2413 and the five defendants in Criminal No. 2412. The thirty-six defendants in Criminal No. 2419 became parties by stipulation (R. 104-106). Added plaintiffs were the ILWU and Jack Kawano, suing as a class representative. The defendants were the same

as in No. 12301, except that Jean Lane, chief of police of the County of Maui, also was made a party defendant and is an appellant here.

Same; plaintiffs' complaint. The complaint, in its attack upon the Unlawful Assembly and Riot Act, was similar to that in No. 12301, being founded upon the same provisions of the Constitution and laws of the United States (R. 7, 11-14, 19-20). The complaint did not attack the conspiracy statute. As previously noted the complaint also attacked the grand jury, but this part of the case has become moot.

This matter is continued under part C.

C. Nos. 12300 and 12301

Defendants' motions in the court below. From the inception of the cases defendants attacked:

(a) The jurisdiction of the court over the subject matter and the maintenance of a federal equity suit as a means of quashing pending criminal charges in the territorial court (No. 12300: motion to dissolve temporary restraining order, R. 35-42, parts I, II and part III, paragraphs 1-3; motion to dismiss and for summary judgment, R. 113-115, 119, part III, and part IV, paragraphs 1-5, incorporated by reference in part V; No. 12301: Return to Order to Show Cause, R. 39-40, parts I and II; motion to dismiss and for summary judgment, R. 57-59, part III and part IV, paragraphs 1-5);

(b) The insufficiency of the complaint to show deprivation of civil rights (No. 12300: motion to dissolve temporary restraining order, R. 41, part XI, paragraphs 2 and 3; motion to dismiss and for summary judgment, R. 116-117, 119, part IV, paragraphs 10 and 11, part V, paragraphs 10 and 11; No. 12301: return to order to show cause, R. 45, part XII; motion to dismiss and for summary judgment, R. 60, part IV, paragraphs 10 and 11);

(c) The joinder in the case of the union and its membership suing by class representative, when the complaint presented no justiciable controversy as to them (No. 12300: motion to dissolve temporary restraining order, R. 37, part III, paragraphs 4 and 5; motion to dismiss and for summary judgment, R. 124-125, part VI, paragraphs 5-8; No. 12301: return to order to show cause, R. 46, part XVI; motion to dismiss and for summary judgment, R. 62-63, part V, paragraphs 5-9);

(d) The failure of the plaintiffs to come into equity with clean hands (No. 12300: motion to dismiss and for summary judgment, R. 116, 119, 125, part IV, paragraph 9, part V, paragraph 9, part VI, paragraph 8; No. 12301: motion to dismiss and for summary judgment, R. 60, 62, part IV, paragraph 9, part V, paragraph 8);

(e) The relitigation in the United States district court, a court having no appellate jurisdiction, of the constitutionality of the riot statute, already litigated in Criminal No. 2365 and upheld by the Supreme Court of Hawaii (No. 12301: return to order to show cause, R. 43-44, parts IX and X; motion to dismiss and for summary judgment, R. 59-60, part IV, paragraphs 6 and 7);

(f) The making of a collateral attack on the composition of the territorial grand jury in lieu of a challenge or plea in the criminal proceeding itself with appellate review thereafter (No. 12300: motion to dissolve temporary restraining order, R. 38-40, parts IV-VIII; motion to dismiss and for summary judgment, R. 126-128, parts VII and VIII; No. 12301: return to order to show cause, R. 41-42, paragraphs III and IV; motion to dismiss and for summary judgment, No. 12301, R. 64-66, part VI, paragraphs 1-12);

(g) Defendants further asserted the constitutionality of the riot and conspiracy statutes and the legality of the 1947 territorial second circuit grand jury as constituted (No.

12300: motion to dissolve temporary restraining order, R. 41, part XI, paragraph 1, motion to dismiss and for summary judgment, R. 117, 120, 125, part IV, paragraphs 12 and 13, part V, paragraphs 12 and 13, part VI, paragraphs 9 and 10; No. 12301: return to order to show cause, R. 44, part XI; motion to dismiss and for summary judgment, R. 60, 63, 66-67, part IV, paragraph 12, part V, paragraphs 10 and 11, part VI, paragraph 14).

Disposition of defendants' motions in the court below. Defendants' objections, stated in each case as grounds against the issuance of a temporary restraining order and in their motions, as above stated, were denied, the objections to the temporary restraining order being denied in No. 12300 on December 10, 1947 (R. 99-103, 1083-1097) and in No. 12301 on January 6, 1948 (No. 12301, R. 49-52), and the motions in both cases being denied on April 19, 1948 (R. 335-337, 1107-1108). No reasons for denial of these objections and motions were stated at the time, except that the United States district judge for the district of Hawaii on December 10, 1947, in connection with the temporary restraining order first issued (No. 12300) after argument of the motion to dissolve the order, said that there were difficult and important matters involved and it might be that the quickest way to get them settled by the Supreme Court of the United States would be through a three-judge court (R. 1084-1085). After plaintiffs had presented their direct case defendants renewed their motions to dismiss, which matter was reserved for later disposition, and denied by the decrees (R. 1570, 545, 548, No. 12301, R. 92, 95).

In its opinion the court below reconsidered defendants' motions to dismiss and devoted a portion of its opinion to the question of its authority to enjoin criminal prosecutions, again denying the motions (R. 467-486, 545, 548; No. 12301, R. 92, 95).

Proceedings after denial of defendants' motions. After denial of defendants' motions on April 19, 1948, the court and counsel discussed the further proceedings, and plaintiffs elected to go forward with the hearing on the application for a permanent injunction (R. 1110, 1128). Little time was available by reason of the commitments of the judges for sessions elsewhere (R. 1116). The court suggested ways and means of shortening the proceedings (R. 1109-1118) as a result of which certain matters were stipulated (R. 337-342; No. 12301, R. 80-84) and all matters not stipulated were denied (R. 343; No. 12301, R. 84) plaintiffs waiving any objection to the employment of a general denial in each answer (R. 1129). Transcripts of other hearings were used by stipulation, as were certain documents (R. 339-342, paragraphs 7-12; No. 12301, R. 82-84, paragraphs 7-10), but defendants only waived the hearsay objection and preserved objections to the entire line of evidence concerning the composition of the grand jury (R. 1129-1132, 1133, 1370, 1518); the court denied these objections together with other objections to evidence, hereinbelow specified (R. 545, 548; No. 12301, R. 91-92, 94). Trial of the case commenced on April 23, 1948, and was concluded on May 1, 1948 (R. 353, 364-365).

Decrees. The court granted injunctions restraining the defendants from proceeding further with the pending prosecutions under the unlawful assembly and riot statute or the conspiracy statute, on the ground of unconstitutionality of those statutes (No. 12300: R. 548, paragraphs 11, 12 and 13; No. 12301: R. 95-96, paragraph 11). In No. 12301 the court also held void the indictment returned December 2, 1947, on the ground that the grand jury was illegally constituted.

There was no injunction against subsequent prosecutions and, as we will show, there was no foundation for any such injunction in the complaints.

D. Questions of fact raised by the pleadings.

Aside from the formal allegations concerning the pendency of the criminal proceedings and the nature and capacity of the parties, which were stipulated to (R. 337-339, paragraphs 1-5; No. 12301, R. 80-82, paragraphs 1-6) the only allegations of fact contained in the complaints were as follows:

The question of peaceful picketing. The complaints alleged the pendency of the criminal prosecutions, hereinabove set forth, and appended the criminal complaints involved in No. 12300 and the indictment involved in No. 12301, all of which charged acts of force and violence as above set forth. In each case, in the motion for more definite statement and as part of the motion to dismiss, it was objected that the pleadings failed to show that plaintiffs were peacefully picketing during the occurrence of the events alleged in the criminal complaints and indictment, respectively,[6] and failed to show that plaintiffs were guilt-

[6] After referring to the pending criminal proceedings the charges in which were appended to the complaints and as above noted averred acts of force and violence, the complaints alleged that the criminal statutes "if enforced against plaintiffs as defendants threaten to do herein, will deprive plaintiffs of their liberty and property without due process of law, in that plaintiffs will be prohibited from exercising their rights of free speech, press and assemblage in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States." (R. 11-12, paragraph XIV, subparagraph (2); No. 12301, R. 13-14, paragraph XI, subparagraph (2).)

In No. 12300, the complaint alleged: "That from July 10, 1947, to and including July 15, 1947, a labor dispute existed in the Territory of Hawaii in which the disputants involved were the plaintiffs herein in part and the Hawaiian pineapple industry." After alleging that the plaintiffs were on strike the complaint continued: "That in connection with publicizing the facts of said labor dispute the plaintiffs herein *during said times* did engage in certain lawful, peaceful and constitutionally protected activities of speech, press and assemblage and of peaceful picketing." (R. 9, paragraph VIII, italics added.) The complaint in No. 12301 was similar (No. 12301, R. 12, paragraph VIII).

less of wrongful conduct, or that they came into equity with clean hands (R. 110-111, 116, 119; part I, paragraph 1, part IV, paragraphs 9 and 10, part V, paragraphs 9 and 10; No. 12301, R. 54-55, 60, part I, paragraph 1, and part IV, paragraphs 9 and 10). These motions, with the other motions, were denied without statement of reasons.

The defendants then answered describing the occurrences and averring that the same did not constitute lawful, peaceful or constitutionally protected activities of free speech or press, peaceful assemblage, or peaceful picketing (R. 343-346, paragraphs II and III; No. 12301, R. 85-86, paragraph II). The court's findings, summarized under the next heading "Facts in the territorial criminal cases," amply support defendants' contention that in each of the occurrences there was deliberate use of mass force and violence, and that in each of the occurrences there was a bright line, easily discernable, between peaceful picketing and the criminal incident itself. The court held that "we do not condone or attempt in any manner to palliate the illegal conduct of the strikers, plaintiffs in these proceedings" (R. 485). But the court held it to be irrelevant that the conduct was illegal.

The court below manifested complete misunderstanding of the difference between, on the one hand, defending a criminal prosecution in the criminal courts, where the defendants, no matter how guilty of unlawful conduct, can only be convicted of the particular charges brought against them under a constitutional law, and, on the other hand, resort to an equity suit where the purpose of the suit is and can only be to protect, promote and further peaceful activities threatened with interference. We shall endeavor in the argument to develop this distinction.

The question of denial of equal protection. The complaints, in paragraphs XIV and XI respectively, after re-

ferring to the pending criminal proceedings alleged that the statutes were violative of plaintiffs' civil rights and the constitution:

> "(6) In that plaintiffs are forbidden the rights, privileges and immunities of speech, press and assemblage in publicizing the facts of the labor dispute above referred to while the same prohibition is not applied or enforced against the other disputants in the said strike situation, namely, the employer group, or to other groups in the community." (R. 11-13, paragraph XIV, subparagraph (6); No. 12301, R. 13-15, paragraph XI, subparagraph (6).)

This matter is argued in point V, *infra*.

The question of jurisdictional amount. Paragraph XVIII of the complaint in No. 12300, as amended (R. 32) and paragraph XXI of the complaint in No. 12301 (No. 12301, R. 24) contain allegations intended to support the jurisdictional amount of $3000, discussed below in that connection (point II, *infra*).

The question of the grand jury. This matter, moot in No. 12300 but considered by the court below in No. 12301 over defendants' objections, is developed in another part of this brief (point XI).

E. Questions of fact not raised by the pleadings.

The question of good faith. The court announced in its opinion that a major issue in the cases was the good faith of the prosecutions (R. 412). The court held that where injunction suits are brought under the Civil Rights Act attacking criminal prosecutions pending against members of labor unions for the use of force and violence in labor disputes, the motive of the prosecutor is in issue, though concededly not so in the ordinary criminal proceeding, and the court identified the motive of the prosecutor with

the good faith of the prosecution (R. 480). We will show from adjudicated cases (point IX, *infra*) that lack of good faith of the prosecution, while frequently asserted, never has been deemed a ground for intervention in pending criminal cases, where such facts can be tried as well as others. But at this point we will confine ourselves to review of the pleadings.

Oppression and intimidation by the prosecution were the substance of the court's findings of lack of good faith. The constituent facts were not pleaded. Plaintiffs' counsel was well aware that for contentions of oppression and intimidation to be considered at all, the constituent facts must be pleaded. The same counsel appeared in *Alesna* v. *Rice,* 74 F. Supp. 865, decided four weeks before the complaint in No. 12301 was filed. In that case the United States district court for the district of Hawaii had pointed out the inadequacy of the complaint to sustain the contentions listed at page 872 of 74 F. Supp. and similar to the matters which the court below injected into these cases in its opinion. In the *Alesna* case the complaint had alleged oppression and intimidation (Record No. 11872 in this Court, page 16); the United States district court said that the complaint's allegations "do not support plaintiffs' argument that a conspiracy to deny plaintiffs their rights and to single them out for prosecution in order to intimidate others has been alleged in the complaint" (74 F. Supp. at p. 876). In the face of this holding plaintiffs filed the same type of pleading in No. 12301. It is manifest that plaintiffs had no intention of presenting an *issue of fact* as to the good faith of the prosecution but on the contrary intended to present an *issue of law* that the statutes were intimidating.

In the *Alesna* case, this Court upon appeal from the above cited decision of the United States district court for the district of Hawaii treated the contention of intimidation as an issue of law, holding that it presented no rea-

son why the contempt case there involved should not proceed in the criminal court (172 F. 2d 176 at p. 177). In a previous paragraph of the opinion this Court remarked that the *Alesna* complaint "alleges no conspiracy or wrongful connection between the prosecution and the employer, as in *Hague* v. *C.I.O.*, 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1423, where the defendant officers, under the pretense of enforcing an unconstitutional ordinance, forcibly deported the charged and other persons without trial beyond the city limits. Nor does the complaint allege any of the facts which the decision of the district court of Hawaii found exceptional in *International Longshoremen's Union* v. *Ackerman,* 82 F. Supp. 65" (referring to the present cases). Of course, this Court did not have before it, as it does now, the record in the present cases, hence did not then know that in these cases, as in the *Alesna* case, no facts to show lack of good faith of the prosecution were pleaded.

The question of impact of the statutes on labor relations. The court went extensively into the impact of the Unlawful Assembly and Riot Act and the conspiracy statute on labor relations (R. 477-479, continued at R. 483). But the complaint in each case only alleged the value of the right of peaceful picketing, in the paragraph relating to jurisdictional amount (R. 33, amended paragraph XVIII; No. 12301, R. 24, paragraph XXI). This was not backed up by any case alleged under any labor relations act or other act relating to commerce (point II-B, *infra*). No justiciable controversy was stated by the union or the class representatives (point VII, *infra*).

STATEMENT OF THE CASE, CONTINUED; FACTS IN THE TERRITORIAL CRIMINAL CASES

The facts as to the three occurrences out of which arose the four pending territorial criminal cases are found by the court in the following portions of the opinion:

Criminal No. 2365, Paia incident, involved in No. 12301, R. 391-395; **Criminal Nos. 2413 and 2419,** Kaumalapau Wharf incident, involved in No. 12300, R. 402-405; **Criminal No. 2412,** Kalua incident, involved in No. 12300, R. 408.

It will be observed that each of the incidents involves the deliberate, planned use of mass force and violence to attain an objective of the strikers, i.e., to stop work from going on. In no instance was there a mere fracas on a picket line, arising from a sudden flare-up of animus. In each incident there is a clear bright line demarking peaceful picketing from what occurred. This appears as follows:

In the Paia incident the men left the picket line and massed to meet the police and the men seeking entry to the mill when the mill whistle blew (R. 393). The strikers had been alerted the day before, when Moniz tried to go to work but could not get through the picket line, and Moniz announced he would return the following day, the day of the incident. On the very day when the union was so forewarned (the day previous to the incident) there arrived from Honolulu one Kealoha, not an employee of the plantation where the incident occurred but a special agent of the ILWU (opinion, R. 393, footnote 17), who proceeded to inform Assistant Chief of Police Freitas "that he had been to the mainland and he had seen a lot of bloodshed" (R. 1646). Joseph Kaholokula who headed the group that talked the matter over with the police on the morning of the incident, before the men tried to go to work, and who informed the police that if the men tried to go to work there would be violence and bloodshed (see findings, R. 393) was president of Local 144, the ILWU local for Maui of pineapple, sugar and longshore workers at that time (R. 1237). Benjamin Awana, one of those specifically mentioned in the court's findings, was secretary of Local 144 (R. 1271). It is significant that

during the incident Kaholokula was heard to say, "Don't forget, boys. Don't forget to do what I told you, boys" (R. 1708-1709). Kaholokula admitted making a speech a few days after the incident in which he said, "At Paia some men tried to go back to work and we stopped them. The police tried to help them but we were stronger. Assistant Chief Freitas and the police were there. We defied the police. If it wasn't for the smartness of Assistant Chief Freitas, there would have been bloodshed" (R. 1269-1270).

In the Kaumalapau Wharf incident the strikers arrived in truck loads to the number of 300 just before the company barge arrived for loading. There was picketing for only eight to ten minutes, when the men broke ranks and charged on the signal of Diego Barbosa (R. 404, 1621-1622). Barbosa was spokesman for five union police who headed the pickets before the charge (R. 1621; the court found Barbosa was one of the union police, R. 403). There can be no doubt that the charge on the supervisors at work on the dock was preconceived. This appears from the facts found by the court.

In the Kalua incident there was no pretense of picketing. The conduct of the strikers rivals that of the Ku Klux Klan, of which Hawaii is fortunately free. Twenty-five men, headed by union police, went up to the Kalua brothers' room to beat them out of going to work. The court finds that they "proceeded to administer a severe beating to Jacob and when his brother, Sam, attempted to rescue him, he too was beaten" (R. 408). The findings as to this incident are somewhat sparse. By the undisputed evidence, the beatings of the Kalua brothers came about through their having been ambushed by the strikers at their place of residence upon their arising to go to work. The strikers gathered outside the brothers' room and penned Jacob in the outside communal washroom. He shoved on the door and it suddenly burst open, whereupon one of the union

police came at him with a rock. He was cut over the eye and received a beating which continued for about ten minutes. When his brother Sam came out of the house to try to help him, he was rushed by some of the strikers. He managed to get away but was trailed and tripped into a seven-foot ditch. One stood over him with a sandbag and asked if he was going to work and when he said no this person said, "You better not, you dirty rat" (R. 1578-1580, 1585-1588, 1593-1596).

Not only did union police, agents and officials head up the several incidents, but on the witness stand not a single union representative made any statement that such activities were unauthorized, or that any measures had been taken by the union against their recurrence. On the contrary, Jack W. Hall, regional director for the ILWU, characterized this as "carrying on legitimate picket activity" (R. 1151), "ordinary picketing" (R. 1152).

SPECIFICATION OF ERRORS[7]

The United States district court for the district of Hawaii is in error in this case in that:

1. The court erred in holding (R. 413) that it had the authority to sit as a three-judge statutory court (points on appeal 8; argued point I-A, *infra*).

2. The court erred in holding (R. 433) that if it was not a statutory three-judge court it was sitting as a court en banc (points on appeal 9; argued point I-A, *infra*).

3. The court erred (R. 335-337, 1107-1108, 519, 370-371, footnote 1, 377, footnote 5, 436-439, 469-471, 476, 495-496) in holding that it had jurisdiction of the subject

[7] In each of the specifications of errors reference is made to the appropriate points on appeal stated pursuant to rule 19 (R. 1974-1992) where matters are stated with more particularity than is possible in the space available here. There also has been supplied a reference to the portion or portions of the brief where the specification is argued.

matter and in overruling the objections thereto stated in defendants' motion to dissolve the temporary restraining order in No. 12300, return to order to show cause in No. 12301, and motions to dismiss and for summary judgment in both cases (points on appeal 1, 3-7, 10, 24, 36, 56-60, and 86; argued point I-B, and also in points II, III-B, VI, VII and XI).

4. The court erred (R. 335-337, 1107-1108, 519, 485) in dening defendants' motions for more definite statements seeking particulars as to each individual plaintiff as to the time in which he claimed to be engaged in peaceful picketing in relation to the time of occurrence of the events alleged in the criminal charges against him, in not holding the complaints fatally defective in failing to show that the plaintiffs were being prosecuted for acts of free speech, peaceable assembly, or peaceful picketing, and in denying defendants' motions to dismiss and for summary judgment (points on appeal 2, 10, 20, 36, and 86; argued points II, VII and VIII, *infra*).

5. The court erred in holding (R. 438-439, 478) that a cause of action under the Labor-Management Relations Act 1947 was involved (points on appeal 37 and 47; argued points II-B, VII and X, *infra*).

6. The court erred (R. 476, 335-337, 1107-1108, 519) in assuming the power to review and reverse the decision of the Supreme Court of Hawaii in *Territory* v. *Kaholokula,* 37 Haw. 625, and in denying defendants' motion to dismiss and for summary judgment (points on appeal 1, 10, 24, and 86; argued point III-B).

7. The court erred (R. 461, 477, 483) in holding that it had authority to reject as erroneous the interpretation put on the unlawful assembly and riot act by the Supreme Court of Hawaii (points on appeal 22 and 25; argued point III-B).

8. The court erred in holding and decreeing (R. 439-

461, 396, 548, No. 12301, R. 95) that the unlawful assembly and riot act was unconstitutional (points on appeal 22-33, inclusive; argued point III).

9. The court erred (R. 461-467, 477, No. 12301, R. 95) in failing to await construction by the Supreme Court of Hawaii of the conspiracy statute, in striking said statute down in its entirety, and in decreeing it to be void (points on appeal 22, 34, 35; argued point IV).

10. The court erred (R. 411-412, 481-482) in finding that the unlawful assembly and riot act has been employed by the Territory only against labor groups in labor disputes, when (1) the only such testimony concerned the County of Maui during the last thirty years, it was only testified that prior to the sugar and pineapple strikes the statute had been invoked in that county once and that case grew out of a labor dispute, and it was also testified by the only witnesses on the point that Maui is a law-abiding community and that there were no other incidents in that county calling for application of the unlawful assembly and riot act; (2) no finding as to the Territory as a whole was called for; (3) the finding made by the court rested on inferences made from the absence of evidence on the part of the defendants as to prosecutions in the Territory as a whole during the period of fifty years, but the defendants did not have the burden of proof; and (4) the plaintiffs did not produce any evidence that in the County of Maui or in the Territory as a whole there were comparable offenses by groups other than labor groups which were not prosecuted under said Act by reason of intentional and purposeful discrimination (points on appeal 50; argued point V).

11. The court erred in overruling (R. 1559) defendants' objections to testimony of the defendant Crockett, called as a witness by the plaintiffs, that during his thirty years experience in the County of Maui the only cases pros-

ecuted under the unlawful assembly and riot act had grown out of labor disputes (R. 1559-1560), the objection being that there was no foundation laid by showing comparable incidents that did not grow out of labor disputes, to wit:

> "MISS LEWIS: I object to the question, your Honor. We would have to have a whole foundation laid in every incident in order to make any comparison whatsoever." (R. 1559)

(points on appeal 49; argued point V).

12. The court erred (R. 335-337, 1107-1108, 519, 469-471, 483, 548-549, No. 12301, R. 95-96) in holding that it could and would enjoin pending territorial criminal prosecutions, in denying defendants' motions to dismiss and for summary judgment, and in enjoining the pending criminal prosecutions (points on appeal 1, 4, 10, 11-19, 86; argued points II, VI and VII).

13. The court erred (R. 335-337, 1107-1108, 519, 438-439, 478-479, 513-515, 519) in holding that the ILWU and the class representatives were proper parties plaintiff, in holding that said union and class representatives were entitled to relief against the criminal statutes, in failing to hold that said union and class representatives had stated no justiciable controversy, in failing to hold that no case of threatened future prosecutions had been stated, and in denying the motions to dismiss from the actions said union and class representatives and also Jean Lane, chief of police of the County of Maui, a party defendant in No. 12300 (points on appeal 36, 37, 43, 86, 87; argued points II, VII and VIII.

14. The court erred (R. 335-337, 1107-1108, 519, 485-486) in holding inapplicable the doctrine that "he who comes into equity must come with clean hands" and in denying defendants' motions to dismiss the actions and for

summary judgment (points on appeal 1, 10, 36, 44, 86; argued point VIII).

15. The court erred in holding (R. 480, 411) that upon an application for an injunction against pending territorial criminal prosecutions, under the Civil Rights Act it constitutes a ground for intervention therein if the prosecutions are deemed by the federal court to be not in good faith, and that motives of the prosecutor are relevant thereto though concededly not relevant to the ordinary criminal proceeding (points on appeal 16, 47 and 48; argued points IX and X, *infra*).

16. The court erred (R. 411-413, 480-483, 485-486) in finding that the pending territorial criminal prosecutions were being carried on for the purpose of attack upon a labor movement and were not in good faith, first, because the constituent facts were not pleaded (points on appeal 47; argued statement of the case, *supra,* part E and point X); second, because such finding was not relevant to the question of intervention by a federal equity court in pending territorial criminal prosecutions (points on appeal 16; argued point IX, *infra*); third, because the matter of good faith of the prosecution was deemed by the court to turn on the motives of the prosecutor which concededly are not relevant to ordinary criminal proceedings (points on appeal 48; argued points IX and X, *infra*); fourth, because such finding of lack of good faith of the prosecutions was not supported by the record, and was based upon inadmissible evidence, abuse of the doctrine of judicial notice, assumptions without basis, transferral to the defendants of a burden of proof which they did not have, arrogation by the court to itself of supervisory authority over the legislative and executive branches of the territorial government which it did not have, and consideration by the court of the irrelevant question of the effect upon labor relations of prosecu-

tion of lawbreakers under the statutes invoked as compared with the effect of prosecution under other statutes. The further specifications as to this fourth matter are as follows:

a. The court erred (R. 482, 438-439, 477-479, 382-388) in taking judicial notice of and making findings and conclusions concerning the history and status of labor relations in the Territory, the attitude of the community toward the labor movement, and the mores of the community, when such matters did not have the indisputable character required for judicial notice, particularly it is not an indisputable fact that labor relations have had unchanging characteristics over the past twenty-five years, yet the court only considered past history; and it was not relevant for the court to consider the effect upon labor relations of prosecution of lawbreakers under the statutes invoked as compared with prosecution under other statutes, consideration thereof constituting an arrogation by the court of supervisory authority over the prosecutor (points on appeal 37 and 38; argued points VII and X, *infra*).

b. The court erred (R. 382-383) in taking judicial notice of and making findings and conclusions concerning Hawaii's land ownership problems when such matters were not pleaded and had no relevancy (points on appeal 38; argued point X).

c. The court erred (R. 388-390, 482) in taking judicial notice of and making findings and conclusions concerning the circumstances which led the 1929 legislature to amend the unlawful assembly and riot act, when it is the prerogative of the legislature to determine the maximum punishment and the only prerogative of a court is to consider whether the same constitutes cruel or unusual punishment within the meaning of the Eighth Amendment, a contention not presented by the plaintiffs or considered by the court (points on appeal 38; argued point X).

d. The court erred (R. 389) in taking judicial notice of the employment of special prosecutors in labor cases in 1910 and 1924, when no counsel employed by any private party was employed as prosecutor in any of the criminal prosecutions here involved or in any of the other criminal proceedings arising out of the sugar and pineapple strikes, and the matter is wholly irrelevant (points on appeal 55; argued point X).

e. The court erred (R. 381-382, 391) in finding true and giving weight to the statements of the witness Hall concerning interference with the ILWU's success in strike action by reason of enforcement of the unlawful assembly and riot statute and the conspiracy statute when such finding was based upon conclusions and speculations of the witness; the reasons given by the witness for his conclusions were contradicted by the undisputed facts in the record; and the question of the effect upon labor relations of prosecution of lawbreakers under the unlawful assembly and riot act and the conspiracy statute as compared with prosecution under other statutes was irrelevant (points on appeal 45; argued points VII and X).

f. The court erred (R. 411, 401, 398-399, 481) in holding that a statute like the assault and battery statute would have been employed if the motive of the prosecutor had been only the maintenance of good order in the community and the punishment of minor lawbreakers, when such conclusion was based partly upon inadmissible evidence (see specification of errors 17-b), and constituted an arrogation by the court to itself of authority it did not have to supervise the county attorney and to determine differences of opinion between the police and the county attorney (points on appeal 37 and 47; argued point X).

g. The court, for the reasons stated in specification of errors 10, erred in finding that the unlawful assembly and

riot act had been employed by the Territory only against labor groups, and further erred (R. 412 and 481-482) in using as demonstrative of bad faith evidence which fell short of a showing of denial of equal protection, the court thereby getting outside the legal issues and exercising supervisory authority over the prosecuting officer (points on appeal 47 and 50; argued points V and X).

h. The court erred in finding mass arrests (R. 398, 406-407, 480) when the officers sought to cope with mass violence and the court had no basis for inferring an ulterior purpose, the court included in its consideration inadmissible evidence (specification of errors 17-a) as to arrests in another county involving obstruction of the highway, and the court would not permit the questions of accountability for the criminal acts to be determined in the proper court (points on appeal 16, 37, 47, 51, 52, and 54; argued point X).

i. The court erred (R. 409-411, 481) in finding that excessive bail was required, when there was no legal issue presented as to bail, the court's holding in said matter invades the authority of the territorial court to consider reduction of bail, and an appellate court would not have found the bail excessive (points on appeal 53; argued point X).

j. The court erred (R. 401, 481) in giving weight to the fact that the second indictment in Criminal No. 2365 was returned by the grand jury before the remittitur of the Supreme Court of Hawaii in *Territory* v. *Kaholokula,* 37 Haw. 625, when the only bearing thereof was in connection with opportunity of the defendants in Criminal No. 2365 to challenge the 1947 grand jury by a plea to said indictment (points on appeal 47 and 60; argued points X and XI).

k. The court erred (R. 478-479, 438-439, 380-381, 382-

384) in considering the details of the strike negotiations, the court having received inadmissible evidence relating thereto (specification of errors 17-e) and having misconstrued the evidence, and the merits of the labor disputes in any event being irrelevant (points on appeal 37, 39, 40; argued points VII and X).

17. The court made the following further errors with respect to the admission of evidence:

a. The court erred (R. 1219, 1567, 519, 409, 481) in overruling defendants' objections to, in failing to strike, and in giving weight to the testimony concerning incidents on the Island of Oahu, City and County of Honolulu, when Oahu is under a different county prosecuting officer, there was no offer to show that the attorney general directed the placing of any charges, the defendant attorney general was not then in office, the charges in the Oahu incidents were obstructing the highway and not unlawful assembly, riot, or conspiracy, and the undisputed evidence shows that in each incident there was obstruction of the highway and in one incident there was also involved the use of physical violence, there being no finding by the court that only peaceful picketing was involved (points on appeal 51; argued point X). The substance of the evidence objected to was that Nicholas C. Sibolboro was arrested during the pineapple strike together with seven others, was taken to the police station at Wahiawa and later to the Honolulu police station, and was charged with obstructing the highway; that Sibolboro was given a six months' sentence; that the cause of his arrest was that in the course of picketing he lay down on the road in front of a truck; that eighty-three others were arrested by the Wahiawa police and taken to the Wahiawa police station and later to the Honolulu police station and charged with obstructing the highway; that the charges were nolle prossed by the city and county prosecutor (R. 1217-1223, 1345-1349, 1562-1567). The objec-

tions and motion to strike by the defendants were as set forth in the footnote.[8]

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[8] "Mr. Crockett: To which we object, if the Court please, as having no bearing whatever on the issues of this case.

"Judge Biggs: Will you explain why, Mr. Crockett?

"Mr. Crockett: Why it has no bearing; in the first place it occurred on the island at Wahiawa; it was on this island, of Oahu. The incidents which are before the Court are instances which occurred on the island of Maui, principally, and the island of Lanai, which is in the County of Maui, and as prosecuting officer I only have jurisdiction on those islands. I have nothing whatever to do with conditions here on Oahu, and in view of the circumstances we submit that they might go out and bring in a thousand persons who might present to the Court some force used or something that happened on the island of Oahu, which was not pertinent to something that took place on the island of Maui.

"Judge Biggs: What have you to say in respect to that?

"Mrs. Bouslog: I am offering this on the fact that the union charges the Attorney General is the defendant in this action, which includes all the counties of the Territory." (R. 1218-1219)

"Miss Lewis: May I ask whether, Mrs. Bouslog, the Attorney General directed that these charges be placed?

"Judge Biggs: Miss Lewis has directed a question to you. Do you propose to answer the question, or not?

"Mrs. Bouslog: Will you repeat the question, Miss Lewis?

"Miss Lewis: I asked whether you proposed to show that the Attorney General had personally directed that this charge be placed?

"Mrs. Bouslog: I don't think, your Honor, that where the charge, acting under the color of law—

"Judge Biggs: Will you answer the question, if you want to. We are not compelling you to answer it.

"Mrs. Bouslog: Our answer to the question, and in fact the whole theory of our proof, is that the Attorney General is personally responsible and has directed the full force of these laws against the working people in the Territory, in an unfair and discriminatory manner.

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b. The court erred (R. 1192, 401-402, 411, 481) in overruling defendants' objections to, in failing to strike, and in giving weight to the testimony and exhibits concerning Mac Masato Yamauchi, when Yamauchi was not a party to the case; the evidence only was used by the court as an instance in which the court felt that the assault and battery statute should have been used instead of the unlawful assembly and riot act, which was an arrogation of supervisory authority not possessed by the court; and it was shown that Yamauchi as strike strategy committee foreman sent out eight cars of men to gang up on three individuals engaged in irrigating the cane during the sugar strike and the court

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"Miss Lewis: That is your theory, but you are not offering to prove that the Attorney General had anything to do with the placing of this charge, is that correct?

"Mrs. Bouslog: Through his officers and agencies, who are also police officers in the Territory, he is responsible.

"Judge Biggs: Let's not have argument here on something that has to be argued later. Suppose you proceed with the questions, and not with an unfruitful exchange." (R. 1220-1221)

"Miss Lewis: I move to strike this whole line of testimony as to what the prosecutor or the police in Honolulu have done or may do.

"Judge Biggs: Strike that portion beyond 'I talked with the persons'." (R. 1564)

"Miss Lewis: If the Court please, I don't want to take time for further cross-examination. I would like to move to strike the testimony. To clear up these matters we would have to bring in all these different police records and other proceedings. I think we are going entirely too far afield, your Honor. To go into the City and County of Honolulu, which is under an entirely different—it is under City and County administration. The prosecutor is appointed by the Mayor. True, the Attorney General has general supervision, but there has been no offer to show that the Attorney General personally directed these particular charges that Mrs. Bouslog was referring to." (R. 1566-1567)

did not find to the contrary (points on appeal 52; argued point X). The substance of the evidence objected to was that Yamauchi, with others, was arrested during the sugar strike; an indictment was returned in three counts, one for riot, one for conspiracy third degree, and one for assault and battery; Yamauchi and the others pleaded nolle contendere to the assault and battery charge and the other charges were dropped; and sentence (fine and suspended imprisonment) was imposed on January 8, 1947, which concluded the matter (R. 1191-1213). The objection was as follows:

> "Mrs. Bouslog: Mr. Crockett said he would not object as to the form.
>
> "Mr. Crockett: No; we are willing to stipulate that that is a copy of the complaint. As I informed counsel, we will object to it because it is not material to the issues in this particular case." (R. 1192)

c. The court erred (R. 382 and 519) in overruling defendants' objections to, in failing to strike, and in giving weight to the testimony of the witness Hall concerning the longshoremen's strike not attempted by the union, when such testimony was wholly speculative and was irrelevant for the reasons stated in specification of errors 16-e (points on appeal 45 and 46 (a); argued points VII and X). The substance of the evidence objected to was that the unlawful assembly statute played a part in the determination by the union as to whether it would undertake a strike of longshoremen and the conclusion reached was that it would be suicide to attempt to strike with such a statute hanging over the heads of the union, "a statute that could easily be invoked and has been in our opinion, or where there have been minor disturbances that might have been provoked by agents provocateur" (R. 1152-1154). The objection was as follows:

"Mr. Crockett: We object to the question because it calls for an opinion of the witness involving something that may happen in the future, or purely speculative." (R. 1153)

d. The court erred (R. 1185, 519, 1303, 1304, 1364) in overruling defendants' objections to and in failing to strike the testimony of the witnesses Rania, De la Cruz, and Kawano concerning the effect of arrests on the union membership, since such testimony was argumentative and merely the conclusions of the witnesses, and was irrelevant for the reasons stated in specification of errors 16-e (points on appeal 46 (b), (c) and (d); argued points VII and X). The substance of the evidence given by the witnesses was that the unlawful assembly and riot statute was directed against labor, that it put fear into the members, that the number arrested was terrific, that the pineapple strike was affected by the number of arrests on Lanai under the unlawful assembly and riot statute with a penalty of twenty years, that the membership fell off after the loss of the pineapple strike, and that the unlawful assembly and riot statute influenced the union not to have a strike of longshoremen (R. 1183-1185, 1303-1306, 1362-1365). The objections were as set forth in the footnote.[9]

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[9] "Mr. Crockett: If the Court please, I ask that the statement of the witness be stricken as a mere conclusion, and argumentative." (R. 1185)

"Mr. Crockett: To which we object, if the Court please, as calling for a conclusion. I don't think he is competent to give his conclusion." (R. 1303)

"Mr. Crockett: To which we object, if the Court please. How could he testify as to that? The witness might say it did or didn't. It is purely speculative and calling for a conclusion. I submit it is not within his power to form an intelligent opinion upon that subject. It is too remote." (R. 1304)

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e. The court erred (R. 1149, 381) in overruling defendants' objection to the admission of testimony as to whether any employer in the sugar or pineapple industry ever agreed to submit to arbitration a wage issue and in giving consideration to said matter in its opinion, when the merits of the labor dispute were immaterial to the case (points on appeal 40; argued points VII and X). The substance of the testimony was that employers in the sugar and pineapple industries had never agreed to submit to arbitration a wage issue (R. 1149-1150). The objection was as follows:

> "Mr. Crockett: To which we object, if the Court please, as being incompetent, irrelevant and immaterial to the issues in this case. It is speculative." (R. 1149)

18. The court erred (R. 335-337, 1107-1108, 519, 486-496, No. 12301, R. 94, 96) in holding that a challenge to the composition of the territorial grand jury for the second circuit could be made collaterally in the federal equity court in lieu of presentation in the criminal court, in denying defendants' motions to dismiss the action and for summary judgment, in overruling and refusing to strike objections to the entire line of testimony concerning the grand jury, and in decreeing void the indictment returned by said grand jury (points on appeal 15, 19, 56-62,

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"Mr. Crockett: We object to that as calling for a conclusion of the witness with no foundation laid on which to base his conclusion; also calling for more or less a conclusion almost as to whether or not the law does have any effect on the rights of the union." (R. 1362-1363)

"Judge Biggs: I think that takes it far enough. You renew your objection to the question?

"Mr. Crockett: Yes, if the Court please, on the same ground I stated." (R. 1364)

64, 68 and 86; argued point XI, also points VI and VII). This line of testimony consists of R. 59-87, 567-1082, 1224-1235, 1251-1255, 1370-1553, 1559 (first fourteen lines), 1560 (beginning in middle of page), 1561, 1568-1569, 1572-1576, 1689, 1740-1752, 1753 (first eight lines), 1794-1833. The objections thereto were as set forth in the footnote.[10]

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[10] "Civil Nos. 828 and 836
Re Grand Jury

"Defendants object to the receipt or consideration of the testimony taken before the Honorable A. M. Cristy on the grand jury challenges made by Barbosa and others and the exhibits in that proceeding, on the ground that none thereof is material or relevant in these proceedings, and upon the following grounds:

"In Civil No. 828, the whole question of the composition of the grand jury is moot, and in any event the plaintiffs would have no recourse in this court until they had exhausted their remedies in the territorial courts and upon appeal therefrom.

"In Civil No. 836, there is no issue before the court because an attack on the composition of the grand jury cannot be made collaterally in federal court, and if not made in the territorial court at the first opportunity is waived. No such attack has been made in the territorial court by the plaintiffs in Civil No. 836. Either plaintiffs have had an opportunity to present this issue in the territorial court and have waived it, or else they have had no opportunity and can still present all contentions based on the constitution and laws of the United States, under the doctrine of Carter v. Texas, 177 U.S. 442. In any event plaintiffs must exhaust their remedies in the territorial courts and upon appeal therefrom.

"Defendants further object to the receipt or consideration in Civil No. 836 of the motions and challenges to the grand jury made by Barbosa and certain others, not parties in Civil No. 836, the orders and ruling of Judge Cristy in the proceedings held thereon, and the certificates of disqualification of Judge Wirtz and Order and Authorization

(Continued next page)

19. The court erred (R. 496-512, No. 12301, R. 96) in finding and concluding that the 1947 territorial grand jury of the second judicial circuit was constituted illegally and in decreeing void the indictment returned by said grand jury, when such finding and conclusion was based on the erroneous findings set forth in specifications of errors 20 and 21 (points on appeal 65-72, 75-80; argued point XI, *infra*).

20. The court erred (R. 499-501, 504-509, 385-388) in finding a deliberate weighting of the grand jury list in favor of a group arbitrarily constituted by the court (the employer-entrepreneur group inclusive of haoles), and against the laboring men of the community, when (1) the members of the grand jury list who were arbitrarily grouped together to constitute the employer-entrepreneur-haole group included persons of variant background, such as government workers and members of the ILWU, and included non-caucasians as well as caucasians; (2) the word "haole"

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to Judge Cristy, upon the grounds above stated and upon the further ground that the same are incompetent and immaterial in Civil No. 836, as they concern proceedings not taken by any plaintiff in that case.

"And defendants further call to the court's attention that challenges to individual members of the grand jury are not involved in these proceedings and the testimony and rulings relating thereto have no materiality or relevancy here. We object to the receipt or consideration of such testimony and rulings on that additional ground, as well as the grounds already stated. This specifically applies to the transcript at the bottom of page 80 beginning with 'Mr. Resner' to page 88, line 11; bottom of page 409, beginning with 'court' to page 419 where the direct examination of Kenneth Auld begins; and page 551 beginning with the word 'secondly' to page 554, line 15, as well as other matters scattered through the transcript" (R. 1130-1132, renewed R. 1370, 1518).

was given variant meanings by the court, but if used to describe part of the caucasian race in contradistinction to another part of the caucasian race it is irrelevant, and if used to describe persons of economic and social attainment it adds nothing to the term "employer-entrepreneur," hence is equally irrelevant; (3) there is no constitutional requirement of proportionate representation; (4) the jury commissioners by law are entitled to select the grand jury list, which imports the exercise of judgment and discretion, but the rule laid down by the court would require them to proceed instead according to a statistical objective impossible of attainment; (5) in finding, in effect, that there were too few laborers on the grand jury list in relation to the number of laborers in Maui County, the court used the device of comparing dissimilar matters—persons of known eligibility (laborers on the list) and persons of unknown eligibility (laborers in Maui County, who included many Filipino non-citizens); and (6) in finding that the asserted overweighting was deliberate the court misconstrued the testimony, and in particular misconstrued the testimony of Jury Commissioner Pombo as indicative of deliberate overweighting, but Mr. Pombo was an old-time champion of the working man and was not a haole according to both his own and the court's classification (points on appeal 69, 70, 71, 72, 75, 76; argued point XI, *infra*).

21. The court erred (R. 501-505, 508, 509) in finding a deliberate exclusion of Filipinos from the 1947 grand jury list, when: (1) the court, without proof, assumed a relevant distinction between Filipinos and other Oriental peoples; (2) the court used as evidence a registry of voters which was not available to the jury commissioners until they were practically finished making their selections; (3) the court assumed "numerous" Filipinos to be qualified on the basis of the 1946 questionnaires, thereby preempting the authority of the jury commissioners to determine compliance with

the literacy, citizenship and other requirements (e.g., the court named three Filipinos as qualified and the jury commissioners had found three other Filipinos qualified); (4) plaintiffs did not prove a long continued exclusion of eligible Filipinos, and their eligibility cannot be assumed under the surrounding circumstances (e.g., they are a recent immigrant group, up until 1946 they could only be naturalized in exceptional instances, and the native born are just beginning to attain the required age); (5) the court considered items 3 and 7 of the questionnaire to prospective jurors, but there was no evidence that any jury commissioner used the questions to determine that a person was a Filipino and then used that determination as the basis for excluding him; and (6) the court's almost complete reliance on the statement of Commissioner Pombo that there were no Filipinos on the grand jury list because there were better men fails to evaluate that statement either in the light of the rest of Pombo's testimony just preceding the words quoted by the court (i.e., that he picked a man on his merits and not on his race or color) or in the light of the statements of each commissioner that he did not exclude any person on the basis of race or color (points on appeal 77, 78, 79, 80; argued point XI, *infra*).

22. The court erred (R. 547, No. 12301, R. 93) in denying the motion to dismiss the defendants Bevins and Crockett after they had ceased to hold office (points on appeal 88; argued point XII, *infra*).

SUMMARY OF ARGUMENT

The court below proceeded on the correct assumption that the relations between the federal court and the territorial courts are the same as the relations between federal courts and state courts; the error lies in the complete misconception of what such relationship is and necessarily must be, if state and territorial courts are to be responsible

for the enforcement of criminal laws. Before developing this further we turn to some preliminary matters.

Point I-A of our argument considers the composition of the court and submits that the opinion below has the status of one rendered by a single judge. In part B of point I we submit that the court lacked jurisdiction of the subject matter. While the provision eliminating jurisdictional amount in civil rights cases applies in Hawaii so does the statute prohibiting injunctions staying state court proceedings; as to pending criminal prosecutions this prohibition is absolute. An equity court has no jurisdiction to stay pending criminal prosecutions.

Point II refers to the nature of the alleged causes of action, and points out that plaintiffs have not shown deprivation of rights secured by the Constitution since the Constitution gives no right to violence. Thus they do not make out a case under the Civil Rights Act. As to the theory that the cases arise under the laws regulating commerce, injected by the court below in its opinion, we show that the cases are not of that nature.

In point III, after considering the origin of the unlawful assembly and riot act and the nature and effect of the 1949 amendments made after these cases were decided below, we proceed to consideration of the decision of the Supreme Court of Hawaii in *Territory* v. *Kaholokula,* rendered in the very criminal case involved in No. 12301 in this Court. In that case the Supreme Court of Hawaii construed the unlawful assembly and riot act and upheld its constitutionality. This decision is binding and conclusive upon the parties who took the appeal to the Supreme Court of Hawaii, subject to review by a court of appellate jurisdiction. The United States district court was without jurisdiction to review it, and in endeavoring to do so it invaded the appellate jurisdiction of this Court. Moreover, even as to the persons who were not parties to the appeal to the Supreme Court

of Hawaii the decision of that court is determinative of the construction of the unlawful assembly and riot act, and the constitutionality of the statute must be judged in the light of that authoritative construction. The rule of *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496, is not satisfied by awaiting state court construction only to ignore it, and the court below erred in placing its own construction on the statute.

In part C of point III we show that the unlawful assembly and riot act as construed by the Supreme Court of Hawaii is valid, that every state in this circuit has an unlawful assembly and riot statute (Appendix VI), and that the court below reached the result it did by ignoring the entire body of common law principles and the ordinary touchstones of criminal law. The recent case of *Cole* v. *Arkansas,* decided by the Supreme Court in 1949, is decisive of the validity of this statute.

Only brief attention is paid to the conspiracy statute, inasmuch as the portion thereof making punishable a conspiracy to commit an offense clearly was constitutional and therefore the criminal cases should have been allowed to proceed (point IV). No reasons were given by the court for striking down the conspiracy statute in toto.

The argument then proceeds to consideration of the plaintiffs' contention that prosecution of the pending cases would deny them the equal protection of the laws (point V). To make out a case of denial of equal protection, at the very least it must be shown that other classes of persons, guilty of comparable offenses, have not been prosecuted due to intentional and purposeful discrimination without valid reason. As to this essential element of a claim of denial of equal protection the court made no finding. Moreover, the court erred in placing on the defendants the burden of proving prosecutions in other counties under the un-

lawful assembly and riot act, of which defendants were first apprised in the opinion of the court.

Having thus considered the defenses of the plaintiffs to the prosecutions pending against them and the nature of the federal court's intervention, we next submit that a federal equity court cannot enjoin pending state or territorial criminal prosecutions, that it lacks jurisdiction to do so, and that there is a vital distinction between pending and future prosecutions (point VI-A). Additionally, as a matter of statutory prohibition, proceedings that are pending in a state or territorial court, even civil proceedings, are not subject to stay by a federal injunction (section 265 of the old judicial code, 28 U.S.C. 379, section 2283 of the new judicial code). This statute, applicable in the Territory of Hawaii by reason of the relations between the two systems of courts, has only a few well defined exceptions and the instant cases do not fall within any of the exceptions (point VI-B).

Part C of point VI submits that the Civil Rights Act did not enlarge the equity jurisdiction of federal courts, that this was expressly provided in the Civil Rights Act itself, and that in so far as Congress intended federal court intervention for the preservation of civil rights in state criminal cases, Congress provided therefor in the removal statute. The only other source of jurisdiction of a federal court in pending state criminal cases lies in the writ of habeas corpus, but this power has been narrowly limited.

Point VII supplements point VI by showing that nothing is involved in these cases except the pending criminal prosecutions, that is, no cause of action was stated by the union or class representatives. This is clear in the light of the principles governing the justiciability of controversies. The present cases bear no resemblance to *A. F. of L.* v. *Watson,* 327 U.S. 582, upon which the court below relied. Discussion of the position of the union and the class representa-

tives in these cases is completed in point VIII, where the maxim that "he who comes into equity must come with clean hands" is considered. The court below erred in failing to perceive the difference between pursuit of activities which, unless the statute under attack imposes a valid restraint, are lawful and constitutionally protected, and pursuit of conduct which, as in the present cases, irrespective of the constitutionality of the statute under attack is unlawful and not constitutionally protected.

Having shown that only pending territorial criminal prosecutions are involved in these cases, and that a federal equity court lacks jurisdiction to intervene therein and is prohibited by statute from doing so, the federal court's power of intervention being limited to removal of the case or habeas corpus, we proceed in point IX to consider whether, in the exercise of those specific powers, alleged bad faith of the prosecution constitutes an exceptional circumstance which will move the federal court to intervention in pending criminal cases. It is not an exceptional circumstance and the federal courts remit petitioners to their remedies in the state courts to show lack of good faith of the prosecution. The statement that "no person is immune from prosecution in good faith for his alleged criminal acts" therefore must be judged in the light of the cases in which the statement is made, which are cases relating to threatened future prosecutions. The quoted statement relates to a situation such as that in *Hague* v. *CIO,* 307 U.S. 496, where it was deportation from the city, not criminal court adjudication, that was threatened; the statement means that where criminal court adjudication will ensue, no one is guaranteed against the prospect of having to present his contentions there.

Point X takes up the finding that the criminal prosecutions were not in good faith, and shows that the court below based this finding on the erroneous holding that motives

are relevant to good faith under the Civil Rights Act; the court conceded that the motives of the prosecutor are not relevant to the ordinary criminal proceeding. The court probed the motives of the prosecutor by considering the impact of the unlawful assembly and riot act on labor relations; the court agreed that the conduct involved was unlawful but disagreed with the prosecutor as to the statute to be invoked and inferred therefrom an ulterior purpose. Thus, under the guise of a finding of lack of good faith, the court assumed supervisory authority over the selection of the statute to be invoked, which is power the court does not possess. There was no showing or finding of any concert of action between the prosecuting officers and the employers or anyone else.

Point XI deals with the issues concerning the 1947 Maui County grand jury. Part A points out that, in No. 12300, plaintiffs deliberately mooted the challenges that, in No. 12300 only, had been made in the territorial court. The court recognized that the issue was moot in this case. Part B submits that the court lacked power to pass upon the grand jury issue in No. 12301, because a federal equity court does not have jurisdiction either to entertain a collateral attack on the composition of a territorial grand jury or to enjoin a pending territorial criminal prosecution. Part C examines the merits of the issues in No. 12301 and demonstrates that: (1) plaintiffs did not prove either the discriminatory exclusion of Filipinos (if Filipinos be a "race" for this purpose) or the deliberate weighting of the grand jury list in favor of businessmen (including "haoles") and against laborers; and (2) on the latter point the lower court laid down a new rule of occupational proportional representation which is impossible for jury commissioners to apply and is not required by the constitution. The court correctly dismissed as without merit plaintiffs' contention based on the exclusion of women.

Point XII submits that the court erred in denying the motion to dismiss the defendants Bevins and Crockett after they had ceased to hold office.

Appendix I contains notes supplementing the argument, where these notes are cited. (The brief, inclusive of the supplementary notes, does not exceed the number of pages allowed by the court for these consolidated cases.)

ARGUMENT

I.

THE COURT WAS NEITHER A STATUTORY THREE-JUDGE COURT NOR A COURT EN BANC. HOWEVER CONSTITUTED, THE COURT LACKED JURISDICTION OF THE SUBJECT MATTER.

A.

The court was neither a statutory three-judge court nor a court en banc.

The court held that it was a specially constituted three-judge court under sections 2281 and 2284 of the new judicial code (section 266 of the old judicial code, 28 U.S.C. 380), or if those provisions were inapplicable in the United States District Court for the District of Hawaii, then it was a court of three judges sitting en banc (R. 432-433; Decree, R. 546 and No. 12301, R. 93). The court was not a statutory three-judge court. The circumstances did not permit of the adoption of the alternative theory that the three-judge court was sitting en banc.[11] District Judge McLaughlin necessarily would be a member of any en banc court. Assuming that the volume of business in the district (R.

[11] We concede that we did not attack in the court below its authority as an en banc court, for we thought the court could sit as a specially constituted three-judge court, though not conceding that substantial questions requiring such a court were presented (R. 1099-1102). However, questions of jurisdiction are always pertinent.

1997-1999) necessitated calling in two outside judges when it was decided to convene a statutory three-judge court, this does not support Judge McLaughlin's absence from an en banc court. The purpose of an en banc court is to obviate conflicts in decisions among the judges of a single court. *Textile Mills Corp.* v. *Commissioner,* 314 U.S. 326, 335[12] (1941), affirming 117 F. 2d 62 (C.A. 3d 1940). Where the quorum of the court is specified, as here a quorum of one judge, the reasoning is that nevertheless the whole number of members of the court constitute the court and may sit as such if they so determine (117 F. 2d supra, at p. 70).

The opinion below relies strongly on subsection (b) of section 132, revised code.[13] Whether or not the second sentence of subsection (b) permits assigned judges to sit in an en banc court, it is evident from the first sentence and also from subsection (c) that the "court" which holds an en banc session must be constituted with at least all judges for the district in active service, here District Judges Metzger and McLaughlin. The cases cited in the opinion (revised footnote 59, R. 435, 521-522) relate to the question of what constitutes a quorum in certain jurisdictions, a question not here in doubt. The question at issue is the power of the court to sit with a number greater than a quorum, that nevertheless does not include the whole court.

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[12] The citations of U. S. reports in the Supreme Court Reporter and Law Edition are given in the Table of Cases.

[13] "**§ 132. Creation and composition of district courts.**
* * *

"(b) Each district court shall consist of the district judge or judges for the district in active service. Justices or judges designated or assigned shall be competent to sit as judges of the court.

"(c) Except as otherwise provided by law, or rule or order of court, the judicial power of a district court with respect to any action, suit or proceeding may be exercised by a single judge, who may preside alone and hold a regular or special session of court at the same time other sessions are held by other judges."

It is idle to speculate, as is done by the court (revised footnote 59, R. 435, 521-522), on what the effect would be if the district judge not sitting had died or were disqualified or absent. Such was not the case.[14]

We submit that the opinion below has the status of one rendered by a single judge, Chief Judge Metzger of the District of Hawaii, and that the three judges who heard the case had no authority to sit en banc.

B.

The Court lacked jurisdiction of the subject matter.

The court held (R. 371, note 1, R. 377-378, note 5, R. 436-439) that it had jurisdiction under section 24 (14) of the old judicial code, 28 U.S.C. 41 (14), section 1343 of the new judicial code,[15] that jurisdictional amount was unnecessary, and that "damages to the individual plaintiffs in either action are not cognizable in terms of money" (R. 377-378, note 5). The court further found that enforcement of the unlawful assembly and riot act caused a decrease in the membership of the union which resulted in loss of dues to the union in excess of $3,000.[16] The court

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[14] See "Suggestion for incorporation in the record on appeal," R. 558-564. The court below made no order relative to this suggestion. See affidavit of counsel filed in this Court, Appendix VIII. Pursuant to Rule 75 (h) of the Federal Rules of Civil Procedure this Court is authorized to consider the subject matter so presented.

[15] These provisions are set out in the appendix p. 165.

[16] In addition to finding jurisdictional amount in the case of the union, the court also held that an unincorporated association could sue under the Civil Rights Act without it (R. 513-515). In so holding the court reverted to the opinion of the Court of Appeals in the *Hague* case, 101 F. 2d 774, 790, which was written by Mr. Justice Biggs who wrote the opinion below; the court admitted that the opinion of the Supreme Court in the *Hague* case did not support its ruling. See 307 U. S. at pp. 514, 525-527. Other cases cited by the court below (*A. F. of L.* v. *Watson*, 327 U. S. 582, 587,

erred in this latter finding, for the reason that it was based on the theory that a case like *A. F. of L.* v. *Watson*[17] had been stated by the union (R. 514); the union stated no such case (point VII, infra). Nor did the union have a legal interest, recognizable as a basis for adjudication, in the pending criminal prosecutions, for it was not a defendant in the criminal cases or in danger of becoming such. Compare *Toomer* v. *Witsell,* 334 U.S. 385, 391, holding that the corporate appellant had no standing in court. See 28 U.S.C. 80 (sec. 1359 of the new code) providing that jurisdiction cannot be based on the improper joining of a party.

There having been no finding of jurisdictional amount as to the individual plaintiffs, applicability of paragraph (14) is essential to jurisdiction (*Hague* v. *C.I.O.,* 307 U.S. 496). There has been a conflict in the rulings concerning the applicability of this provision in Hawaii. Cf *Mo Hock*

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and *Grosjean* v. *American Press,* 297 U. S. 233, 244) are not in point because they did not sustain jurisdiction under the Civil Rights Act.

The court below seems to have assumed, without giving any reasons therefor, that a right to sue under the Civil Rights Act automatically would mean that jurisdictional amount was unnecessary (R. 436-438). This was error. As pointed out by Mr. Justice Stone in the *Hague* case (307 U. S. at pp. 527-532) the right to sue without jurisdictional amount is limited to cases in which the right asserted is inherently incapable of pecuniary valuation. We submit that rights incapable of pecuniary valuation necessarily are individual rights, and that the ILWU, viewed apart from its members (who sued by class representatives) and treated as an artificial entity having standing to sue as such under the Federal Rules of Civil Procedure, could not sue without jurisdictional amount anymore than could a corporation.

[17] In *A. F. of L.* v. *Watson,* 327 U.S. 582, the law under attack was one regulating the right to bargain collectively for a closed shop. Judged in the light of the principles which govern findings of jurisdictional amount (*McNutt* v. *General Motors,* 298 U. S. 178, 181; *Packard* v. *Banton,* 264 U. S. 140; *Snively Groves Inc.* v. *Florida Citrus Commission,* 23 F. Supp. 600, D. C. Fla.) some such case as was involved in *A. F. of L.* v. *Watson* was essential as a basis for the finding of jurisdictional amount.

Ke Lok Po v. *Stainback,* 74 F. Supp. 852, reversed on another point 336 U.S. 368; *Alesna* v. *Rice,* 74 F. Supp. 865, affirmed on other grounds 172 F. 2d 176. See the early ruling that jurisdictional amount was necessary, made in the case below (R. 102, 1087).

We are of the view that paragraph (14) applies in Hawaii, notwithstanding the use therein of the word "state,"[18] but by the same token section 265 of the old judicial code prohibiting injunctions staying state court proceedings, 28 U.S.C. 379, section 2283 of the new judicial code, applies in Hawaii[19] and prohibits the relief granted.

The court below (R. 436, 468-469) sustained the applicability in Hawaii of both of these statutory provisions upon the reasoning stated in the portion of its opinion relating to the three-judge-court provision. Since the three-judge-court provision fell because of the burden placed by it on the functioning of the federal judicial system, and not because of any general inappropriateness in the Territory of Hawaii of statutes of the type being considered, the applicability of the latter remains unaffected. This is made clear by the *Mo Hock Ke Lok Po* case itself, wherein the very ground of reversal of the decision below upholds the independence of the territorial judicial system, the Supreme Court holding that the federal court should not have entertained the case because: "territorial like state courts are the natural sources for the interpretation and application of the acts of their legislatures and equally of the propriety of interference by injunction" (336 U.S. at p. 383). Hence, this court's pronouncement in the *Alesna* case (172 F. 2d at p. 179) that: "the Organic Act places the courts of the Territory of Hawaii in a relatively similar position to the

[18] The word "state" includes "territory" in some situations. *Andres* v. *United States,* 333 U. S. 740; *Stainback* v. *Mo Hock Ke Lok Po,* supra, at p. 378.

[19] The statute is set out in the appendix, pp. 166-168, together with the authorities relating to its applicability in Hawaii.

federal judicial system as are the state courts," and that "if a constitutional district court is precluded by statute or rule of law from interfering in state court proceedings similar to the proceedings in which this *Rice* order was issued, the United States District Court for the District of Hawaii is precluded from interfering with the territorial court proceedings," remains good law after the *Mo Hock Ke Lok Po* case, as it was before.

The question of jurisdictional amount aside, the court lacked jurisdiction over the subject matter because the rule prohibiting a federal equity court from interfering in pending state and territorial criminal prosecutions is absolute and jurisdictional, as will be submitted in point VI. Moreover a federal equity court lacks jurisdiction to entertain a challenge to a territorial grand jury (point XI, infra) and lacks jurisdiction to review a decision of the Supreme Court of Hawaii (point III, infra).

As to section 24 (8) of the old judicial code, 28 U.S.C. 41 (8), section 1337 of the new judicial code, upon which the court below also relied for its jurisdiction, its applicability in Hawaii is unquestioned but it has no application in this case. This is considered in point II.

II.

PLAINTIFFS DID NOT SHOW A CASE ARISING UNDER THE CIVIL RIGHTS ACT OR A LAW REGULATING COMMERCE.

A.

Plaintiffs did not show a case arising under the civil rights act.

To establish a cause of action under 8 U.S.C. 43[20] each plaintiff must show that: (1) he is a citizen of the United States or a person within its jurisdiction; (2) he has a right, privilege or immunity secured by the Constitution and laws of the United States; (3) he has been deprived of such right, privilege or immunity; (4) he has been so deprived by a person under color of a statute, ordinance, regulation, custom or usage of the Territory of Hawaii; and (5) he has been injured by such deprivation. *Hague* v. *CIO,* 307 U.S. 496, 507, 512; *Bomar* v. *Keyes,* 162 F. 2d 136, 138, 139, cert. denied 332 U.S. 825.

In all cases arising under the Constitution and laws of the United States (of which a civil rights case is an instance)

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[20] This section reads as follows:

"§ 43. **Civil action for deprivation of rights.**

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S. § 1979."

The complaints also cited 8 U. S. C., sections 41, 44 and 46. However, only section 43 grants a substantive right of action (*Hague* v. *C.I.O.,* 307 U.S. 496, 512, 525, 526). Section 41 is simply a general declaration of policy by Congress, passed originally (in the Civil Rights Act of April 9, 1866) to implement the Thirteenth Amendment (1865), and later reenacted (in the Civil Rights Act of May 31, 1870) to implement the Fourteenth Amendment (1868). Section 44 relates exclusively to juries and is discussed in point XI; this section is now section 243 of Revised Title 18 U. S. C. (The Criminal Code). Section 46 relates solely to Supreme Court review of cases arising under section 44.

the cause of action must be grounded in a right or immunity derived from the Constitution or laws, and it is not enough that a federal defense to state action lurks in the background. *Gully* v. *First National Bank,* 299 U.S. 109, and cases cited; *Defiance Water Co.* v. *Defiance,* 191 U.S. 184. As stated by Mr. Justice Jackson in *National Insurance Co.* v. *Tidewater Co.,* 337 U.S. 582, 597:

> "* * * a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's *cause of action.*"

What is this right, privilege or immunity of which plaintiffs allege they have been deprived? Certainly it is not the right to violence, for the Constitution does not secure such a right. Yet the plaintiffs did not deem it part of their cause of action to show, and the court below did not deem it part of plaintiffs' cause of action to find, that lawful constitutionally protected acts of free speech or peaceable assembly occasioned the criminal prosecutions (See statement of the case, *supra,* pp. 13-14). Plaintiffs' case differs radically from *Hague* v. *CIO, supra,* and other civil rights equity cases, where the plaintiffs have shown and the court has found that pursuit of constitutionally protected activities occasioned the defendants' interference. Hence, plaintiffs did not show a case arising under the civil rights act.

The foregoing discussion has been centered in the cause of action for invalidation of the criminal statutes. The cause of action for invalidation of the grand jury is considered in points VI and XI.

B.

Plaintiffs did not show a case arising under a law regulating commerce.

The remaining provision relied upon by the court below to sustain its jurisdiction is that relating to suits and pro-

ceedings "arising under any law regulating commerce."[21] The pleadings herein did not allege, or attempt to allege, any cause of action "arising under any law regulating commerce." This matter did not come into the cases until the court introduced it in its opinion. It is extraneous to any issue in the case. To arise under a law regulating commerce, there must be a "controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends." *Gully* v. *First National Bank, supra,* 299 U.S. at p. 214. Such controversy must appear from plaintiff's own statement of its case at the outset. *Banker's Casualty Co.* v. *Minneapolis, St. Paul Ry.,* 192 U.S. 371. In the present cases it was not pretended by the plaintiffs that anything was added to the rights claimed under the Constitution and civil rights act by the National Labor Relations Act (49 Stat. 449, c. 372), or the Labor-Management Relations Act 1947 (61 Stat. 136, 29 U.S.C. Supp. 141 et seq.), cited by the court as laws regulating commerce, but not cited in the pleadings, and not involved in the case.

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[21] Section 24 (8) of the old judicial code, 28 U.S.C. 41 (8), confers jurisdiction:

"Eighth. Of all suits and proceedings arising under any law regulating commerce."

Section 1337 of the new judicial code is substantially the same, except that it also includes paragraph (23) of the former section 24. It reads as follows:

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

III.

THE COURT ERRED IN PLACING ITS OWN CONSTRUCTION UPON THE UNLAWFUL ASSEMBLY AND RIOT ACT, DIFFERING FROM THAT OF THE SUPREME COURT OF HAWAII, AND IN INVALIDATING THE STATUTE ON THE BASIS OF ITS OWN CONSTRUCTION.

A.

Origin of the Statute; 1949 amendments.

The history of the unlawful assembly and riot statutes is set forth in the appendix,[22a] where it is shown that it was enacted in 1850 and continued in effect by the Hawaiian Organic Act. Unlawful assembly and riot statutes exist throughout the United States; every state in this judicial circuit has such a statute or statutes (Appendix VI). The Hawaiian statute as it stood at the time of these cases is printed in Appendix II, pp. 188-192, and references are to the sections there set forth.

By Act 62 of the Session Laws of Hawaii 1949 the statute was completely amended. This Act is set forth in Appendix III, pp. 192-195. The maximum punishment for any offense under the amended Act is two years. Section 6 of this 1949 Act provides that it shall not affect the liability of any person to prosecution and punishment for the offense of riot committed prior to the effective date of said Act (the effective date being April 21, 1949), "provided further, that in no event shall the punishment for any such offense exceed the punishment provided for the offense of riot by section 11579 of the Revised Laws of Hawaii 1945, as amended by this Act," i.e., a maximum of two years imprisonment or fine.

[22a] Appendix, pp. 168-170.

B.

Effect of the decision of the Supreme Court of Hawaii in Territory v. Kaholokula (37 Haw. 625).

The decision is binding and conclusive on the parties who took the appeal to the Supreme Court of Hawaii. The defendants in Criminal No. 2365,[23] plaintiffs in No. 12301, have been heard in the Supreme Court of Hawaii on the very questions of the construction and constitutionality of the unlawful assembly and riot act presented in the court below. The Supreme Court held that the statute was derived from the common law, that it did not apply to peaceful picketing or any peaceful acts, that no one could be prosecuted under the statute without a showing of participation of at least three persons in acts which struck terror or tended to strike terror into others, and that persons merely present could not be prosecuted, only persons who, by promoting or abetting the lawless acts, became principals therein. The Supreme Court held that the statute was constitutional.

Shortly after the Supreme Court announced its opinion the appellants there brought suit in the court below. This was in violation of the established principle that a United States District Court *does not have jurisdiction* to relitigate the constitutionality of a statute sustained by a state court. This court so held as to a criminal statute in *Borland* v. *Johnson,* 88 F. 2d 376 (C.A. 9th, 1937) cert. denied. 302 U.S. 704, citing *Rooker* v. *Fidelity Trust Co.,* 263 U.S. 413, which holds at p. 416 that such relitigation "would be an exercise of appellate jurisdiction. The jurisdiction possessed by the district courts is strictly original." It was so held in *Chirillo* v. *Lehman,* 312 U.S. 662, affirming on the authority of *American Surety Co.* v. *Baldwin,* 287 U.S. 156,

[23] Masao Sera is the only one of these defendants who was not a party to the appeal to the Supreme Court of Hawaii.

169, the opinion in 38 F. Supp. 65, 67, that "a judgment of a state court may not be reviewed by a bill in equity in a federal court." In the *American Surety Co.* case the Supreme Court aptly says (287 U.S. at p. 169): "Federal claims are not to be prosecuted piecemeal in state and federal courts." There are many other cases to the same effect.[24]

Therefore the lower court erred (R. 476-477, No. 12301, R. 95) in decreeing the unlawful assembly and riot act void as to the very defendants in Criminal No. 2365 who appealed to the Supreme Court of Hawaii.

The decision is determinative of the construction of the unlawful assembly and riot act. Manifest error was committed by the lower court in its treatment of the construction put upon the unlawful assembly and riot act by the Supreme Court of Hawaii in *Territory* v. *Kaholokula, supra.* Even if the Supreme Court's decision as to the constitutionality of the statute was not binding as to those who were not parties to the *Kaholokula* appeal, the Supreme Court's *interpretation* of the statute was binding in *any* case in the federal court, being a matter of local law.[25] The federal question begins with the statute as authoritatively interpreted by the local court. It is for this reason that, where the constitutionality of a state statute is attacked in a federal equity court and the statute has not been construed, the court will not proceed but will hold the case to await an authoritative construction of the state statute, so that its constitutionality may be judged in the light of that

[24] *Napa Valley Electric Co.* v. *Railroad Commission,* 257 Fed. 197, 199 (D.C. Cal.); *Consolidated Freightways* v. *Railroad Commission,* 36 F. Supp. 269 (D.C. Cal.); *Baker Driveway Co.* v. *Hamilton,* 29 F. Supp. 693 (D.C. Pa.); *General Exporting Co.* v. *Star Transfer Line,* 136 F. 2d 329; 335 (C.A. 6th 1943); *Ritholz* v. *North Carolina Board,* 18 F. Supp. 409, 413 (D.C. N.C.); *Davega-City Radio Inc.* v. *Boland,* 23 F. Supp. 969, 970 (D.C. N.Y.); *Frazier Co.* v. *Long Beach,* 77 F. 2d 764 (C.A. 3d).

[25] *Hebert* v. *Louisiana,* 272 U.S. 312, 316; *Erie R.R.* v. *Tompkins,* 304 U.S. 64; Rules of Decisions Act, 28 U.S.C. 725, now section 1652.

authoritative construction. *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496; *Chicago* v. *Fieldcrest Dairies*, 316 U.S. 168; *Spector Motor Co.* v. *McLaughlin*, 323 U.S. 101; *A. F. of L.* v. *Watson*, 327 U.S. 582, 598. The lower court erred when it held that it had satisfied the rule of these cases because the construction of the local statute, there directed to be awaited, here had occurred (R. 477). The rule of *Railroad Commission* v. *Pullman Co.* is not satisfied by awaiting state court construction only to ignore it. The purpose of obtaining the state court's construction of the state law of course is that the constitutionality of the statute may be judged in the light of that construction. As succinctly stated by the Supreme Court of the United States in *Winters* v. *New York*, 333 U.S. 507, 514:

> "* * * The interpretation by the Court of Appeals [of New York] puts these words in the statute as definitely as if it had been so amended by the legislature."

The *Winters* case was a first amendment case. There are many other instances where it has been asserted that a statute was so broad as to infringe first amendment rights, and the authoritative construction of the statute by the state court has been held decisive.[26] When *Thornhill* v. *Alabama*, 310 U.S. 88, cited by the court below (R. 459-460), is compared with *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572-573, a later opinion written by the same judge (Mr. Justice Murphy) also in a first amendment case, it is clear that the criterion of the restraint imposed by a statute is *the construction authoritatively put upon it*. Thus in the *Chaplinsky* case, the court refers to and upholds "the limited scope of the statute as thus construed" (P. 573). The *Thornhill* case is one of a line of cases holding that

[26] *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572-573; *Terminello* v. *Chicago*, 337 U.S. 1, 4; *Cox* v. *New Hampshire*, 312 U.S. 569, 575; *Kovacs* v. *Cooper*, 336 U.S. 77 (when compared with *Saia* v. *New York*, 334 U.S. 558).

where a person has been convicted upon a record which demonstrates a too broad construction of the statute, so that his punishment may be attributable to acts which under the Constitution cannot be punished, the presence in the record of evidence of unlawful acts which under the Constitution may be punished will not save the judgment. Other such cases are *Thomas* v. *Collins,* 323 U.S. 516, 541; *Stromberg* v. *California,* 283 U.S. 359, 367.

The Supreme Court of the United States will not consider a contention that a too broad statute imposes a restraint upon first amendment rights in the absence of an authoritative application of the statute. *Federation of Labor* v. *McAdory,* 325 U.S. 450, 457-460; *Rescue Army* v. *Municipal Court,* 331 U.S. 459, 568-575; *Musser* v. *Utah,* 333 U.S. 95; *United Public Workers* v. *Mitchell,* 330 U.S. 75 (contention of restraint on free speech summarized p. 83, note 12, refusal to consider the contention pp. 90-91); *United States* v. *Petrillo,* 332 U.S. 1, 9-10. This is referred to by the Supreme Court in the *Rescue Army* case as "a policy of strict necessity in disposing of constitutional issues."

Same rules apply in Hawaii. The same deference to the local courts in matters of statutory interpretation is required of a federal court sitting in a territory. *DeCastro* v. *Board of Commissioners,* 322 U.S. 451, 459; *Stainback* v. *Mo Hock Ke Lok Po, supra,* 336 U.S. 368, 383. The holding of this Court (172 F. 2d at pp. 178-179) that the relations between the territorial and federal court are the same as between state and federal courts and that criminal laws of the Territory and prosecutions thereunder are entitled to the same protection as state prosecutions, is conclusive. Hence the court below erred when it held it to be within its authority to rule that the interpretation of the

statute by the Supreme Court of Hawaii was erroneous (R. 483).

The lower court stated "we do not ignore the fact that it is our duty to follow the interpretation of constitutionality imposed on the statute by the Supreme Court of Hawaii unless, in our opinion, that interpretation is clearly erroneous" (R. 483). The lower court there had reference to the appellate jurisdiction of this Court,[27] and it failed to recognize that it was not an appellate court. Moreover, when appellate jurisdiction exists over the interpretation of territorial statutes this is a very narrow field, as this Court repeatedly has recognized. In usurping appellate jurisdiction the trial court paid mere lip service to its limitations (R. 461, 476-477, 483), for it failed to recognize that disagreement with the Supreme Court's interpretation would not stamp that interpretation as manifestly erroneous. *Bonet* v. *Texas Co.*, 308 U.S. 463, 471 (note 27, appendix p. 173).

C.

The unlawful assembly and riot act as construed by the Supreme Court of Hawaii was valid.

The statute codifies common law offenses; dispersal of unlawful assemblies and riots is not involved. It is important to keep in mind the distinction between (1) the common law offense of riot, (2) the duty of officers to disperse unlawful assemblies and riots, and (3) the consequence of failure to disperse upon an order to do so. The latter two matters were the subject of the English statute of George I, making it a capital offense for an unlawful assembly of twelve or more persons not to disperse after a proclamation ordering them to do so. This English statute was of great concern to the court below (R. 444) but it was not involved. Moreover, the Hawaiian statute does not permit an assembly to be dispersed unless there is a

[27] Appendix, pp. 172-174.

where a person has been convicted upon a record which demonstrates a too broad construction of the statute, so that his punishment may be attributable to acts which under the Constitution cannot be punished, the presence in the record of evidence of unlawful acts which under the Constitution may be punished will not save the judgment. Other such cases are *Thomas* v. *Collins,* 323 U.S. 516, 541; *Stromberg* v. *California,* 283 U.S. 359, 367.

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[27] Appendix, pp. 172-174.

clear and present danger of breach of the peace; the statute thereby conforms to the American view as to constitutional requirements.[28]

The common law of riot was so extensively reviewed by this Court in *Salem Mfg. Co.* v. *First American Fire Ins. Co.*, 111 F. 2d 797, 802-805, as to make it unnecessary to quote from the various works on criminal law. The following is from the charge to the jury in *People* v. *Judson,* 11 Daly (N.Y. 1, 82:

> "* * * A riot may be defined to be a tumultous disturbance of the public peace by three or more persons assembled together of their own authority, mutually assisting each other against all who oppose them, and engaged in executing some design in a violent and turbulent manner, to the terror and alarm of by-standers or the neighborhood. The offenses comprehended within this general definition constitute three kinds of offenses—an unlawful assembly, a rout, and a riot. The unlawful assembly is where the parties come together with the intent before stated; rout is where they move forward to the execution of their design, and the riot takes place when they begin with force and violence to execute their design.[29] Distinguishable from either of these offenses, is the offense which is denominated an affray. An affray is when persons come together without a premeditated design to disturb the peace, and suddenly break out into a quarrel among themselves; and it is contradistinguished from a riot, by being more of a private nature. * * *"

Blackstone[30] explains that at common law such offenses were committed by three or more acting together, with a

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[28] See note 22b, Appendix, pp. 170-172.

[29] Section 11571 of the Hawaii law provides that "a riot is where three or more being in unlawful assembly join in doing or actually beginning to do an act, with tumult and violence, and striking terror, or tending to strike terror into others."

[30] Blackstone's Commentaries, Book IV, pp. 142-143, 146 (from 2 Cooley's Blackstone, pp. 1318, 1321-1322; 2 Jones' Blackstone, pp. 2326, 2330-2331).

punishment by fine or imprisonment. But if the assembly was to the number of twelve or more, then the statute of George I could be invoked. As above noted that statute made it a capital offense not to disperse after a proclamation to disperse, one hour being allowed for the purpose. Blackstone explains that this statute of George I was one of a long line of such statutes.

No order of dispersal was necessary to make out the common law offense.[31] The Supreme Court of Hawaii so held in the *Kaholokula* case (37 Haw. at p. 639).

The common law offense of riot is codified by sections 11570-11575 of the Hawaiian statute, sections 11578-11580 being the penalty provisions. (Compare similar statutes in the states within this judicial circuit.)[32] The second matter above mentioned, i.e., the statutory duty of officers to disperse unlawful assemblies and riots, is covered by sections 11581-11584 of the Hawaiian statute. (Compare similar statutes in the states within this circuit.)[33] The third matter above mentioned, i.e., the consequence of failure to disperse upon an order to do so, is covered by sections 11576-11577 of the Hawaiian statute. (Compare similar statutes in the states within this circuit.)[34]

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[31] *State* v. *Russell,* 45 N.H. 83; *Rex* v. *Fursey,* 6 Car. & P. 80, 172 Eng. Rep. 1155; 24 Am. & Eng. Encyc. of Law, 2d Ed., p. 976.

[32] See in appendix VI, pp. 201-213, the following: *Arizona,* secs. 43-1303, 43-1304; *California,* secs. 404-408; *Idaho,* secs. 17-3001, 17-3002, 17-3003, 17-3004, 17-3005; *Montana,* secs. 11285-11289; *Nevada,* secs. 10278, 10279; *Oregon,* secs. 23-801, 23-802; *Washington,* secs. 9078, 9079, 9080, 9082, 9083.

[33] Appendix VI includes such provisions in part, but supplementary provisions, such as for calling out the militia and defining what is justifiable homicide, have not been included. See in appendix VI, pp. 201-213, the following: *Arizona,* secs. 43-1305, 45-109; *California,* secs. 410, 726, 727; *Idaho,* secs. 17-3007, 19-224, 19-225; *Montana,* secs. 11291, 11658, 11659; *Nevada,* secs. 4836, 4837, 4838; *Oregon,* sec. 23-806; *Washington,* sec. 1799.

[34] See in appendix VI, pp. 201-213, the following: *Arizona,* sec. 43-1304; *California,* sec. 409; *Idaho,* sec. 17-3006; *Montana,* sec. 11290; *Oregon,* sec. 23-806; *Washington,* sec. 9081.

That statutory provisions codifying the common law offenses of unlawful assembly and riot are separable from dispersal provisions and those relating to the consequence of failure to disperse, is clear from their separate origins. Such statutes often appear in different chapters. (Compare the statutes cited in footnote 32 with those cited in footnotes 33 and 34.) The Supreme Court of Hawaii in the *Kaholokula* case held that the validity or invalidity of the dispersal provisions did not affect the remainder (37 Haw. 625, 633, 639). This decision on separability of the statute was binding on the federal court, being another of the statutory construction questions, hence a local issue. *Rescue Army* v. *Municipal Court, supra,* 331 U.S. 549, 573-574; *Skinner* v. *Oklahoma,* 316 U.S. 535, 543; 11 Am. Jur. 840, sec. 153.

The offense involved in these cases is riot, not failure to disperse upon an order to do so.[35] A federal court is not concerned with the validity of a portion of a criminal statute deemed independent by the state court and not involved in the case before the federal court. *Chaplinsky* v. *New Hamphire, supra,* 315 U.S. 568, 572; *Watson* v. *Buck, supra,* 313 U.S. 387, 397; *Ex parte Kinnebrew,* 35 Fed. 52, 57.

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[35] The indictment returned in Criminal No. 2365 and considered by the Supreme Court of Hawaii was for riot. In its present form the count for riot (N. 12301, R. 29-32) charges that the defendants therein named with divers other persons joined together in assaulting and inflicting or attempting to inflict corporal injuries upon five named persons (the five men trying to enter the mill at Paia) which with other conduct there described did tend and intend to intimidate and strike terror into them. [An attempt is some act done toward committing an offense and in part execution of the intent to commit it, section 10610, Revised Laws of Hawaii 1945.] Other allegations setting forth the various elements of the offense of riot are there made.

While in Criminal Nos. 2412, 2413, and 2419 the parties are held under commitments for grand jury action and the grand jury has not proceeded by reason of the temporary restraining order and the decree below, the criminal complaints in each instance allege facts which would constitute a riot, and the commitments were on that

The court below ignored the common law offense; the court thought the statute of George I was the sum total of the law on the subject. The court then took alarm by reason of a footnote in the case of *Bridges* v. *California,* 314 U.S. 252, 265, footnote 9 (R. 458-459). From this footnote the court seems to have reasoned that the existence of an assembly never can be an element in a criminal statute. Of course the footnote in the *Bridges* case had no such meaning, as is clear from *Cole* v. *Arkansas,* decided by the Supreme Court of the United States on December 5, 1949, 338 U.S. 345, 94 L. Ed. Adv. Op. 139. The footnote in the *Bridges* case very evidently had reference to the abuses of the statute of George I in England, whereby the statute came to be used for the dissolving of assemblies that had met for the consideration of grievances against the crown. The Hawaiian statute guarded against such abuses by providing that an assembly was not unlawful unless what occurred struck terror or tended to strike terror into others.[36] But in any event, the dispersal of an assembly is not here involved.

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theory (R. 90, 95, 138, 322). The complaints allege that the defendants therein named with divers other persons joined together in assaulting, beating, striking, and inflicting corporal injuries upon named persons (Jacob Kalua in Criminal No. 2412, and certain of the persons working at Kaumalapau Wharf in Criminal Nos. 2413 and 2419) which with other conduct there described did tend and intend to strike terror into said named persons. Other allegations setting forth the various elements of the offense of riot are there made.

There were no orders to disperse given. The statute required a command "in the name of the Territory" (Section 11581); no such formal command was given. *People* v. *Sklar,* 111 Cal. App. 776, 292 Pac. 1068. No orders to disperse are charged in the criminal charges. Therefore it is unnecessary to consider whether the plaintiffs could be prosecuted merely for failure to disperse upon an order to do so if not otherwise guilty.

[36] How the abuses of the statute of George I came about and how they are not possible under the Hawaiian statute, is explained in note 22b, appendix, pp. 170-172, where the authorities are cited.

The terms of the statute being common law terms, the statute affords an ascertainable standard of guilt. Since the statute codifies common law offenses, the Supreme Court of Hawaii obviously was correct in its holding that the terms of the statute were common law terms. The employment in the statute of common law terms removes from the case any contention that the statute does not contain an ascertainable standard of guilt. The describing of crimes by words well understood in the criminal law is "permissible uncertainty." *Territory* v. *Kaholokula, supra,* 37 Haw. 625, 632-633; *Kovacs* v. *Cooper, supra,* 336 U.S. 77, 80; *Nash* v. *United States,* 229 U.S. 373, 376, as construed in *Connally* v. *General Construction Co.,* 269 U.S. 385, 391; *Crawford* v. *United States,* 30 App. D.C. 1. Thus this case is distinguishable from such cases as *Lanzetta* v. *New Jersey,* 306 U.S. 451, 455, where the meaning was not derivable from the common law as there pointed out.

The requirement that what occurs must strike terror or tend to strike terror into others, as demonstrative of a clear and present danger of breach of the peace. The phrase "striking terror or tending to strike terror" used throughout the Hawaiian statute, was one of those deriving its meaning from the common law (37 Haw. at p. 32). The Supreme Court of Hawaii placed great emphasis on this element of the offense, holding that "acts which strike or tend to strike terror into others are essential ingredients of the offense of riot" and must be averred in the indictment (37 Haw. at p. 642). The court further said:

> "* * * Speech occasioned by disturbance, tumult and violence, which accompanies an act or the actual beginning of an act striking terror or tending to strike terror into others, transcends free speech and peaceable assembly" (37 Haw. at p. 631).
>
> "* * * To say that the unlawful assembly and riot statutes nullify and destroy the substance of the right to picket is tantamount to saying that picketing may

> with impunity be unlawful to the extent defined by section 11570 and the participants may, with equal impunity, join in doing or actually beginning to do an act with tumult and violence and striking or tending to strike terror into others. The right asserted is peaceful picketing and not riot as defined by section 11571 * * *" (37 Haw. at p. 636).

Under this construction of the law the offense could occur only if there was a breach of the peace or clear and present danger thereof. There must be overt acts "of such a nature as to inspire well grounded fear in persons of reasonable firmness and courage of a * * * breach of the peace." *State* v. *Butterworth,* 104 N.J.L. 579, 142 Atl. 57; *State* v. *Wooldridge,* 129 W.Va. 448, 40 S.E. 2d 899; *Commonwealth* v. *Paul,* 145 Pa. Super. 548, 21 A 2d 421; *People* v. *Kerrick,* 86 Cal. App. 542, 261 Pac. 756, 759- 760; *Salem Mfg. Co.* v. *First American Fire Ins. Co.,* supra, 111 F. 2d 797, 805; Annotation, 58 A.L.R. 751. The Supreme Court of the United States has always supported this reasonable man test as valid. *Chaplinsky* v. *New Hampshire, supra,* 315 U.S. at p. 573; *Nash* v. *United States,* supra, 229 U.S. at p. 377.

Since the statute applies only when there is a clear and present danger of breach of the peace, beyond doubt it prescribes a punishable offense. *Cantwell* v. *Connecticut,* 310 U.S. 296 at p. 308 and compare p. 310, the court distinguishing between an immediate threat to the public peace and the mere airing of views arousing animosity in others. The same distinction is made in *Chaplinsky* v. *New Hampshire,* supra, holding punishable the use of derisive, fighting words; compare *Terminiello* v. *Chicago,* supra, *Hague* v. *C.I.O.,* supra, and *Sellers* v. *Johnson,* 163 F. 2d 877, cert. den. 332 U.S. 851, holding that speech cannot be restrained merely because it arouses public resentment, if it falls short of an immediate threat to the public peace.

The court below, in its holding that the test laid down by the words "striking terror or tending to strike terror into others" was "purely subjective," "the test of reasonableness is absent from the statute" (R. 453), showed lack of knowledge of the principles of law involved. The court's error is illustrative of the wisdom of the rule leaving the interpretation of state laws to the state courts. It had not even been disputed that the Supreme Court of Hawaii interpreted the statute by reference to the common law test, which contemplated whether a man of reasonable firmness would be terrified (R. 1104).

Other points of disagreement between the court below and the Hawaiian courts[37] likewise concern the meaning of the statute, which it was the lower court's duty to leave to the Hawaiian courts.

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[37] The court below said that section 11574 seemed to intend the effect that a lawful meeting performing lawful acts would be a riot if any terror was excited (R. 456). If the court below had consulted the common law the meaning would be clear. The section has reference to two things, a change in the character of an assembly and the performance of a lawful act by unlawful means. As to the first matter covered by the section see *Blakeman* v. *City of Wichita,* 93 Kan. 385, 144 Pac. 816; *People* v. *Bundte,* 87 Cal. App. 2d 735, 197 P. 2d 823, cert. denied 337 U.S. 915. As to the second matter covered by this section see 2 Wharton's Criminal Law, 12th ed., Sec. 1863.

Section 11572, to which the court below refers (R. 453) is explanatory, as held by the Supreme Court of Hawaii (37 Haw. at p. 628). The lower court's erroneous treatment of this section was due to its previous error with respect to the significance of the words "striking terror or tending to strike terror into others."

The reference (R. 453-454) to Judge Wirtz's oral opinion ex parte in the injunction matter is of no apparent relevance, since if it amounted to a construction of the statute by Judge Wirtz it nevertheless preceded the Supreme Court's opinion, which the circuit judge would follow. In any event Judge Wirtz obviously was not construing the Unlawful Assembly and Riot Act as authorizing an injunction. The judge had before him an ex parte showing justifying the order. (Record in this Court in No. 11568, pp. 80-100). Of course the union could have applied for modification of the order. The whole matter was so trivial that the lower court rejected it when offered (R. 1295-1297), then took judicial notice of it.

The test of accountability. This branch of the case has been decisively determined by the recent and final decision of the Supreme Court of the United States in *Cole* v. *Arkansas,* 338 U.S. 345, 94 L.Ed Adv. Op. 139 (December 5, 1949). Before taking up that case we again are obliged to consider the construction of the statute.

The Supreme Court of Hawaii considered the contentions presented by Kaholokula et al as (1) the right to do in concert what can be done singly, that is, picketing, either in small or large numbers and (2) the right not to be held accountable for unlawful acts of other persons. As to these contentions the court said:

> "* * * Appellants argue that since there is a common purpose in picketing, the unlawful act of one or more individuals can convert the picket assembly into an unlawful assembly and hence the right not to be held accountable for such unlawful acts is invaded by the riot and unlawful assembly statutes. But this is not so. An analysis of the hypothesis suggested and the law applicable demonstrate its fallacy. The right to peaceful picketing is unquestioned. If an assembly has for its purpose peaceful picketing but lawlessness occurs not amounting to unlawful assembly as defined by section 11570, accountability therefor depends on whether the person merely present aided, incited, encouraged or countenanced those guilty of lawlessness. If so, he is deemed a principal therein [R. L. H. 1945, s. 10670]. If these elements are not present, he is not accountable for the unlawful acts of others. If the lawlessness assumes the proportions of an unlawful assembly or riot, accountability therefor by a person merely present depends upon whether that person promoted the same or aided, abetted, encouraged or countenanced the parties concerned therein by words, signs, acts or otherwise. If so, he is deemed a principal [R. L. H. 1945, s. 11575]. If not, he is not accountable for the riotous acts of others * * *" (37 Haw. at p. 637).

As to this, the lower court said that the verb "countenance" signified that "anyone whose mien or appearance was deemed to favor the assembly would himself be guilty as a principal" (R. 456). Of course, the term is not so used in jurisprudence.[38] The lower court was assuming that proper instructions would not be given to the jury at the proper time.

The lower court further took exception to section 11573, dealing with concurrence in intent (R. 454-455). This section is explanatory of one element of the offense of riot. The lower court held that only a violent tumultuous act could join the actor in the common unlawful intent to maintain a riot, and that section 11573 permits guilt to be implied "by the mere presence at the scene of any person" (R. 455). The Supreme Court of Hawaii, on the other hand, had said that mere presence was not enough to convict any person; to be accountable he must have promoted or abetted the lawless acts, as more fully explained in the portion of the Supreme Court's opinion above quoted. The lower court's disagreement was based upon its insistence that for a person to be an accountable participant, as distinguished from being merely present, he must himself have perpetrated a violent, tumultuous act.

Whether the right of assembly confers immunity of a member of the assembly unless he actually himself perpetrates acts of force or violence, or whether he is accountable if he is present and furthers a concerted purpose to do those acts, is the issue involved. This question was decisively determined in *Cole* v. *Arkansas, supra,* decided by the Supreme Court of the United States on December 5, 1949, 338 U.S. 345, 94 L.Ed. Adv. Op. 139. The opinion holds that furtherance of a concerted unlawful purpose is enough to make one accountable for the acts of an unlawful assembly. This was deemed elementary by the Supreme

[38] *Cooper* v. *Johnson,* 81 Mo. 483, 489.

Court of the United States. The substantial question in the *Cole* case was whether the state courts had so shifted their construction of the statute between the trial and the appellate review as to convict the petitioners on an issue not made before the jury. The earlier *Cole* case (333 U.S. 196) had held that could not be done. The latest opinion holds that it was not done.

The Arkansas statute involved in the *Cole* case and its construction by the Arkansas court[39] are stated by the Supreme Court of the United States as follows:

> "Section 2 of Act 193, Acts of Arkansas 1943, provides:
>
> > " 'It shall be unlawful for any person acting in concert with one or more other persons to assemble at or near any place where a "labor dispute" exists and by force or violence prevent or attempt to prevent any person from engaging in any lawful vocation, *or for any person acting either by himself or as a member of any group or organization, or acting in concert with one or more other persons to promote, encourage or aid any such unlawful assemblage. . . .*' (Italics supplied.)
>
> "In the opinion under review, the Supreme Court of Arkansas has indicated that as to one charged with a violation of the italicized portion, the statute requires that the accused aid the assemblage with the intention that force and violence would be used to prevent a person from working. * * *
>
> "* * * the appellate court spelled out what is implicit in the instructions of the trial court, and both were agreed that the statute authorized no conviction for a mere presence in an assemblage at which unplanned and unconcerted violence was precipitated by another."

[39] *Cole and Jones* v. *State,* 214 Ark. 387, 216 S.W. 2d 402.

The question of conflict between the Arkansas statute as so construed and the right of assembly was summarily disposed of by the court as follows:

> "What we have already said disposes of the contention that this Act as applied to petitioners abridges freedom of assembly. For this argument, too, rests on the assumption that this Act penalizes for mere presence in a gathering where violence occurs. As we have pointed out, the statutory text does not so read, the charge of the trial court expressly negatived this construction * * *.
>
> "Accordingly, we are not called upon to decide whether a state has power to incriminate by his mere presence an innocent member of a group when some individual without his encouragement or concert commits an act of violence. It will be time enough to review such a question as that when it is asked by one who occupies such a status. * * *
>
> "Certainly the Act before us does not penalize the promotion, encouragement, or furtherance of peaceful assembly at or near any place where a labor dispute exists, nor does it infringe the right of expression of views in any labor dispute.
>
> "Quite another question is involved when one is convicted of promoting, encouraging and aiding an assemblage the purpose of which is to wreak violence. Such an assemblage has been denominated unlawful by the Arkansas legislature, and it is no abridgment of free speech or assembly for the criminal sanctions of the state to fasten themselves upon one who has actively and consciously assisted therein."

The *Cole* case like the Territory's criminal cases (Statement of the Case supra, pp. 17-20) was one where planned violence occurred at an assemblage. Under the holding of the court below (R. 455) one who was present in the assemblage promoting a common unlawful purpose to maintain a riot could not be punished unless he himself perpetrated a violent tumultuous act. The facts in the *Cole*

case demonstrate the error of this holding. As to the petitioner Cole the only evidence was that he was present at a discussion held the morning of the day of the occurrence, at which it was agreed to whip employees at the mill if they didn't talk right; that he afterward was present at the mill carrying a club or walking stick, and that he told one of the employees leaving the mill to go ahead, that they were not after him. This was prior to the fight. Jones gave the signal that started the fight upon the exit of the awaited employee, but it does not appear that Cole did any specific act.[40] It was not found that Cole joined in the fight. Other recent cases that are enlightening are *People* v. *Bundte,* 87 Cal. App. 2d 735, 197 P. 2d 823, 832, cert. denied 337 U.S. 915, and *People* v. *Moore,* 87 Cal. App. 2d 753, 197 P. 2d 835, 838, cert. denied 337 U.S. 915.

In *Whitney* v. *California,* 274 U.S. 357, 366-367, it was contended that the California statute there involved, as construed and applied, penalized the defendant for her mere attendance at an assemblage (a convention) at which there subsequently occurred unlawful acts of others unforeseen and not joined in by her, and without a showing of specific intent on her part to join in the forbidden purpose. The court held this was a question going to the weight of the evidence, not a constitutional question. So here, since the Hawaii statute does not penalize mere presence of any person, the question is one of fact to be judged in the light of (1) the charges, (2) the evidence, (3) the instructions to the jury, (4) review by the Supreme Court of Hawaii of such convictions as may result, and (5) federal court review of the constitutionality of such convictions. The prejudgment of such questions in equity is unparalleled. The precise reason for the "policy of strict necessity in disposing of constitutional issues" to which we

[40] See part II of the opinion of the state court (214 Ark. 387, 216 S.W. 2d 402) which was under review.

have referred (supra, p. 56), is to avoid conjecturing up a multitude of difficulties in the segregation of the guilty from the innocent, questions which it is the business of the criminal courts and juries to resolve, and which might never reach the constitutional level. See *United States* v. *Petrillo, supra,* 332 U.S. 1, 9-12.

The maximum punishment allowed by the statute. Inasmuch as the maximum punishment was reduced by the 1949 legislature to two years and this part of the 1949 amendment was made retroactive, and inasmuch as the matter of maximum punishment was not treated by the court below as a constitutional issue, our discussion of the matter will be brief. The effect upon this provision of other statutes of the Territory is reviewed in a note.[41]

Either the twenty years' maximum was a "cruel and unusual punishment" within the meaning of the Eighth Amendment or it was not. It was not assailed as such by the pleadings herein or in the *Kaholokula* case in the Supreme Court of Hawaii. In argument counsel for the plaintiffs admitted that it did not constitute cruel and unusual punishment (R. 1103). The court did not hold it to be such.

The reason for the failure of the plaintiffs to attack the penalty provision is obvious. It was inserted by a 1929 amendment, in a statute which since 1850 had prescribed a maximum penalty of five years. If the amendatory statute of 1929 so increasing the punishment was invalid, the original statute stood as it read before that amendment. (1 Sutherland Statutory Construction 3d ed. sec. 1937; *Frost* v. *Corporation Commission,* 278 U.S. 515, 525.) Thus a direct attack on the penalty provision could not lead to the striking down of the whole statute, which was plaintiffs' object.

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[41] Appendix, pp. 174-175.

The reference to Chaffee's Free Speech in the United States, page 10 (R. 461, note 69) has no bearing. The point made by the author is that the First Amendment protects against punishment for speech one is entitled to make. This is a truism. It is equally well settled that the First Amendment does not protect against punishment for speech one is not entitled to make. *Winters* v. *New York, supra,* 333 U.S. 507, 510; *Gitlow* v. *New York,* 268 U.S. 652, 666; *Fox* v. *Washington,* 236 U.S. 273.

IV.

THE COURT ERRED IN INVALIDATING THE CONSPIRACY STATUTE.

A.

Origin of the statute; 1949 amendments.

The history of the statute is set forth in the appendix.[42] The statute as it stood at the time of these cases is printed in appendix IV, pp. 195-198, and references are to the sections there set forth.

By Act 10 of the Special Session Laws of Hawaii 1949 the statute was completely amended. This Act 10 is set out as appendix V, pp. 198-200. Section 7 of said Act 10 provides that it shall not affect the liability of any person to prosecution and punishment for the offense of conspiracy committed prior to the effective date of that Act (August 29, 1949) and that all such offenses may be prosecuted and punished the same as if said Act had not been enacted.

B.

The criminal case should have been allowed to proceed under the conspiracy statute, since at least a portion of the statute was valid and independently sustainable.

In the second indictment in Criminal No. 2365 there was

[42] Appendix, p. 175.

a second count[43] for conspiracy, third degree, a misdemeanor. The case is No. 12301. The conspiracy statute was not mentioned in the pleadings in No. 12300. The court struck the statute down in toto (R. 467, No. 12301, R. 95) and enjoined its use in Criminal No. 2365 (No. 12301, R. 95-96).

The court confined its objections (R. 461-467) to the last clause of section 11120 which relates to a conspiracy "* * * to do what plainly and directly tends to excite or occasion offense, or what is obviously and directly wrongfully injurious to another." But by the first clause of section 11120 it was provided that "a conspiracy is a malicious or fraudulent combination or mutual undertaking or concerting together of two or more, to commit any offense or instigate any one thereto." This last quoted and obviously constitutional provision was involved, as the court knew and had not overlooked (R. 401). The indictment averred a conspiracy to commit acts of violence against and inflict corporal injuries upon five named persons (No. 12301, R. 32-34), i.e., a conspiracy to commit the offense of assault and battery.[44] True, the indictment also referred to the concerting together of the defendants in Criminal No. 2365 to prevent said five persons from engaging in their employment (No. 12301, R. 33-34), but this part of the indictment was not necessary to the charge of conspiracy to commit assault and battery.

Irrespective of the constitutionality of the last clause of section 11120 the first clause clearly was complete in itself and constitutional. Conspiracy to commit an offense or

[43] This was pleading in the alternative to meet the proof (No. 12301, R. 32) as allowed by section 10804 of the Revised Laws of Hawaii 1945.

[44] The court erroneously referred at R. 401 to "conspiracy to commit a felony third degree." This is a legal impossibility. Conspiracy to commit a felony would be first degree. Correctly, conspiracy to commit a misdemeanor, i.e., assault and battery, was involved. This falls into the third degree category. Such a conspiracy is a misdemeanor (sections 11128 and 11130).

to instigate an offense involves no uncertainty; the court conceded that the term "offense" was clear (R. 464-465). The provision is not directed against an assemblage as such, or against the subject matter of a speech; it is directed against the undertaking, however or whenever arrived at, to do specific unlawful acts or to instigate others to specific unlawful acts. The matter is made clear by *Fox* v. *State of Washington, supra,* 236 U.S. 273, and by comparison of *Whitney* v. *California, supra,* 274 U.S. 357 with *De Jonge* v. *Oregon,* 299 U.S. 353, commenting on the *Whitney* case at page 363. Surely the court cannot have believed that the right of union members to concert together for lawful ends includes the right to concert together for unlawful ends. See *International Union U.A.W.A.* v. *Wisconsin Board,* 336 U.S. 245, 257-258; *Lincoln Federal Labor Union* v. *Northwestern Iron and Metal Co.,* 335 U.S. 525, 529-531; *Cole* v. *Arkansas, supra,* decided December 5, 1949.

We have shown that when a state court deems the validity of the first portion of a criminal statute to be independent of the validity of another portion, it is the duty of a federal court to so consider it, and that when a state court has not passed on the separability of the portions of a statute it is the duty of a federal court to permit it to do so, particularly when it is the practice in the state court to uphold independent portions of a statute irrespective of the validity of other portions. *Rescue Army* v. *Municipal Court, Skinner* v. *Oklahoma, Watson* v. *Buck,* 11 Am. Jur. 840; *supra,* p. 60. The first clause of section 11120 obviously was separate and independent of the second clause. Portions of statutes have been upheld in instances by no means as clear. *Ex parte Bell,* 19 Cal. 2d 488, 122 P. 2d 22; *New York Central R. R.* v. *United States,* 212 U.S. 481, 496-497; *Territory* v. *Tam,* 36 Haw. 32, 41-42.

Had there arisen in normal course upon demurrer to

an indictment[45] the question of invalidity of one of several independent portions of a statute involved in the indictment the Supreme Court of Hawaii would not have sustained the demurrer but would have allowed the case to proceed as to the valid portions. *Territory* v. *Tam, supra,* 36 Haw. at pp. 41-42. The Constitution does not forbid this so long as the verdict of the jury rests only on the valid portions. *Stromberg* v. *California, supra,* 283 U.S. 359, 367-368. Thus the lower court, by taking the cases out of their normal course, reached a result different from that which the Supreme Court of Hawaii would have reached, in matters not involving the Constitution. There can be no justification for such treatment.

The court gave no reason for striking down the statute in toto other than to state that the statute "by reason of its vagueness and uncertainty must be held to be unconstitutional in its entirety" (R. 467). But the court had found vagueness and uncertainty only in a separable portion of the statute. Hence the statute could not be struck down in toto, and the prosecution for conspiracy to commit assault and battery could not be enjoined.

As to the separable second clause of the statute, found vague and uncertain by the court, since the 1949 amendments have eliminated it our discussion will be brief. We submit that this clause was capable of a constitutional construction,[46] and that, as to this portion of the statute, the rule of *Railroad Commission* v. *Pullman Co., supra,* should have been applied, but as the court lacked equity jurisdiction (point VI, infra) there was no occasion to hold the case even as to this portion of the statute. *Atlantic Fishermen's Union* v. *Barnes,* 71 F. Supp. 927, 928.

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[45] The *Kaholokula* case in 37 Haw. did not involve the count for conspiracy, which was added in the second indictment.

[46] *Musser* v. *Utah,* 333 U.S. 95, 97; *United States* v. *Petrillo,* 332 U.S. 1, 11; *Screws* v. *United States,* 325 U.S. 91, 96, 101; *Territory* v. *Belliveau,* 24 Haw. 768, 771, cf. *Territory* v. *Hart,* 35 Haw. 188.

V.

PROSECUTION OF THE PENDING CASES UNDER THE RIOT AND CONSPIRACY STATUTES WOULD NOT DENY PLAINTIFFS THE EQUAL PROTECTION OF THE LAWS.

A.

Nature of plaintiffs' claims.

This point has to do with that part of the complaints relating to the denial of equal protection (Statement of the Case, supra, pp. 14-15).

If relevant at all this contention goes to the individual plaintiffs' defense to the criminal prosecutions pending against them. We will show that no injunction was issued against further prosecutions and that no further prosecutions are involved (point VII, infra). This then is an attempt to present in equity, pleas and defenses to criminal charges, over which equity has no jurisdiction, as submitted in point VI. But at this point the brief is devoted to showing that in any event, irrespective of the forum for the presentation of such defense, plaintiffs did not present a good defense.

B.

Essential elements of a claim of denial of equal protection in the administration of criminal laws.

Applicability of equal protection clause in the territories. At the outset it must be noted that the Fifth Amendment contains no equal protection clause[47] and the Fourteenth Amendment does not apply to territories.[48] However, the

[47] *Hirabayashi* v. *United States,* 320 U.S. 81, 100.

[48] It never has been decided that the Fourteenth Amendment applies to the Territory of Hawaii, and only the Fifth Amendment has been applied. *Alaska* v. *Troy,* 258 U.S. 101, 66 L.ed. 487; *Farrington* v. *Tokushige,* 273 U.S. 284, 299, 71 L.ed. 646, 651; *In re Yerian,* 35 Haw. 855, aff'd 130 F. 2d 786; *Hawaiian Trust Co.* v. *Smith,* 31 Haw. 196, 201; *Territory* v. *Armstrong,* 28 Haw. 88. The circuit court of appeals of the first circuit has said that:

"* * * It is well settled that the Fourteenth Amendment has no application to territories. * * *"

South Porto Rico Sugar Co. v. *Buscaglia,* 154 F. 2d 96, 101.

Fifth Amendment protects against discrimination by legislative action, and for purposes of argument it will be assumed that it also protects against discrimination by administrative action of a type which the legislature could not have authorized in the first place.[49]

Pertinency of a claim of denial of equal protection in the administration of criminal laws. Even under the equal protection clause, it by no means is clear that a claim of denial of equal protection in the administration of criminal laws can defeat a criminal prosecution[50] and we submit that the better rule is to the contrary. As said in *Thompson* v. *Spear,* 91 F. 2d 430, 434 (C.A. 5th 1937):

> "* * * Any willful or negligent failure to enforce these provisions would constitute a wrong against the sovereign, and be contrary to the public interest; but would, in no instance, enhance the rights of the wrongdoers. Wholesale lawlessness does not give a citizen the right to proclaim a suspension of the law and to proceed himself to violate it; if he attempts to do so, he is clearly outside the protection of a court of equity, into which he must come with clean hands. * * *"

Essential elements of a claim of denial of equal protection in the administration of laws. The leading case on denial of equal protection through administrative action is *Snowden* v. *Hughes,* 321 U.S. 1, a case not involving administration of criminal laws. The court held the com-

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[49] See *Hirabayashi* v. *United States, supra; United States* v. *Josephson,* 165 F. 2d 82, 92 (C.A. 2d 1948) cert. denied 333 U.S. 838, 858, 335 U.S. 899. *Snowden* v. *Hughes,* 321 U.S. 1, 11, holds that even under the equal protection clause the test of discrimination by administrative action is whether it is of a type which the legislature could not have authorized in the first place.

[50] *Buxbom* v. *City of Riverside,* 29 F. Supp. 3, 8 (S.D. Cal. 1939), decision by Judge Yankwich, *Jackie Cab Co.* v. *Chicago Park District,* 366 Ill. 474, 9 N.E. 2d 213 (1937), *People* v. *Montgomery,* 47 Cal. App. 2d 1, 117 P. 2d 437, all distinguishing *Yick Wo* v. *Hopkins,* 118 U.S. 356.

plaint insufficient in its failure to allege facts tending to show an intentional or purposeful discrimination between persons or classes; this could not be supplied by the epithets "willful," "malicious," "unequal," "unjust," "oppressive," employed in the complaint.

What is essential to prove an intentional or purposeful discrimination in the administration of criminal laws is established by *Ah Sin* v. *Wittman,* 198 U.S. 500, 507-508. It was alleged that an ordinance was enforced solely and exclusively against persons of the Chinese race, in denial of the equal protection of the laws, this contention being based on *Yick Wo* v. *Hopkins,* 118 U.S. 356. This contention was held unsupported on the ground:

> "* * * There is no averment that the conditions and practices to which the ordinance was directed did not exist exclusively among the Chinese, or that there were other offenders against the ordinance than the Chinese as to whom it was not enforced. *No latitude of intention should be indulged in a case like this.* There should be certainty to every intent." (198 U.S. at pp. 507-508, italics added.)

Other cases considering the contention of denial of equal protection in the administration of criminal laws all have held that a showing of enforcement exclusively against persons of one class or even that others guilty of the same offense have not been prosecuted, is insufficient.[51] Hence, even assuming that denial of equal protection can be asserted against a criminal prosecution, it must be shown

[51] *Buxbom* v. *City of Riverside, supra,* 29 F. Supp. 3, 8; *Boynton* v. *Fox West Coast Theatres,* 60 F. 2d 851 (C.A. 10th 1932); *Broad-Grace Arcade Corp.* v. *Bright,* 48 F. 2d 348 (E.D. Va. 1931) affirmed 284 U.S. 588; *Grell* v. *United States,* 112 F. 2d 861 (C.A. 8th 1940); *Saunders* v. *Lowry,* 58 F. 2d 158 (C.A. 5th 1932); *Barsky* v. *United States,* 167 F. 2d 241, 251, App. D.C. 1948, cert. denied 334 U.S. 843; *Jackie Cab Co.* v. *Chicago Park District, supra,* 366 Ill. 474, 9 N.E. 2d. 213, 216; *Cone* v. *State,* 184 Ga. 316, 191 S.E. 250; *Creash* v. *State,* 131 Fla. 111, 179 So. 149.

(1) that the law has been invoked exclusively against persons of one class, (2) that *other classes of persons are guilty of comparable offenses and have not been prosecuted,* and (3) that the fact that one class of persons has been prosecuted and other classes of persons equally guilty have not, is due to intentional and purposeful discrimination without valid reason.

C.

The facts in these cases.

The court made much of the fact that in the experience of deputy county attorney Crockett, covering thirty years in the county of Maui, "except for the present cases, there was only one case prosecuted in the county of Maui for unlawful assembly, and that grew out of an alleged kidnapping that took place during a labor dispute" (R. 1559-1560, Opinion, R. 411-412). This evidence was admitted over the objection that a foundation should be laid by showing comparable incidents that did not grow out of a labor dispute (R. 1559). The receipt and use of this evidence, in the manner it was used by the court, was error.

By stretching this evidence lengthwise to cover not only Mr. Crockett's experience of thirty years but also the entire period of fifty years of the Territory's existence, and by further stretching its breadth so as to cover not only the county of Maui but also the entire Territory of Hawaii, the court managed to find "that the unlawful assembly and riot act has been employed by the Territory only against labor groups in labor disputes," during the life of the Territory (R. 411-413, 481-482).[52] The court so enlarged the actual evidence, which concerned thirty years in the county of Maui, by inferring that the evidence was the same as to an earlier additional period of twenty years and as to

[52] It is in the latter portion of the opinion that the finding is enlarged from thirty years to the entire life of the Territory.

all the other counties of the Territory. This was inferred because defendants, who did not have the burden of proof, did not produce evidence covering the additional years and additional counties. Such was manifest error. *Lau Hu Yuen* v. *United States,* 85 F. 2d 327, 329 (C.A. 9th 1936). Prior to the opinion of the court the defendants were not even informed that they had been given the burden of covering the additional years and additional counties.

Like all findings made without evidence this one is erroneous. During the preparation of this brief an application for a pardon brought to the attention of this office a conviction for riot in the fourth judicial circuit, now consolidated with the third circuit. The case was Criminal No. 2005 in the former fourth circuit, part of the island of Hawaii. Fifteen defendants were convicted of riot on pleas of guilty. The facts were that on August 29, 1940, a group of young men went from Hilo to Honomu to seek revenge for a fight between themselves and some Honomu boys that had occurred at a bon dance (Japanese memorial festival) at Honomu on August 24, 1940. On this second occasion the Hilo boys beat up several Honomu boys. The case had nothing to do with a labor dispute.

The finding not only was unsupported by the evidence but there was no relevancy in extending the inquiry to the Territory as a whole. It was the deputy county attorney of Maui who decided what charges should be brought (R. 1676, 1683) and the incidents involved all occurred in that county. Denial of equal protection in the administration of laws is a matter of purposeful discrimination, as we have shown. Hence, in order to bring other counties into the scope of the inquiry, it would be necessary to show that the several county attorneys[53] were acting in concert. This

[53] The county attorney of Maui is an elective official, and acts as public prosecutor for that county (Section 6266, Revised Laws of Hawaii 1945). In each of the other counties there is an elective

is very well explained in *Boynton* v. *Fox West Coast Theatres, supra,* 60 F. 2d 851, 854.

Purposeful discrimination could not be established through the failure of the attorney general[54] to establish uniformity throughout the Territory in the charges to be used on all occasions, even assuming it was feasible for him to establish such uniformity. Moreover, how an office is handled is individual to the person who occupies it,[55] and there have been many attorneys general during the life of the Territory. The present attorney general, defendant appellant, took office on October 14, 1947 (R. 457).

The precedent which the opinion below seeks to establish is an extremely dangerous one. For example, we have examined all the reported decisions in the state of California in prosecutions for riot.[56] In seven of them the facts appear,[57] and six of those seven cases grew out of labor disputes;[58] the other case (*People* v. *Dunn*) grew out of a

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county attorney acting as public prosecutor, except that in the city and county of Honolulu the public prosecutor is appointed by the mayor with the approval of the board of supervisors (section 6528, Revised Laws of Hawaii 1945), the mayor and board of supervisors being elected.

[54] The attorney general has general control and direction over the county attorneys, including the public prosecutor of the city and county of Honolulu. Sections 6266, 6271, 6528, 6615, 1501, 1502, Revised Laws of Hawaii 1945.

[55] *Ex parte La Prade,* 289 U.S. 444.

[56] *People* v. *Sklar,* 111 Cal. App. 776, 292 Pac. 1068; *People* v. *Bradley,* 137 Cal. App. 225, 30 P. 2d 438; *People* v. *Dunn,* 1 Cal. App. 2d 556, 36 Pac. 2d 1096; *People* v. *Montoya,* 17 Cal. App. 2d 547, 62 P. 2d 383; *People* v. *Yuen,* 32 Cal. App. 2d 151, 89 P. 2d 438, 90 P. 2d 291; *People* v. *Spear,* 32 Cal. App. 2d 165, 89 P. 2d 445; *People* v. *Bundte, supra,* 87 Cal. App. 2d 735, 197 P. 2d 823, cert. denied 337 U.S. 915; *People* v. *Moore, supra,* 87 Cal. App. 2d 753, 197 P. 2d 835, cert. denied 337 U.S. 915.

[57] In the first case cited in the preceding footnote the facts do not appear, but do appear in the remaining seven cases.

[58] See also *People* v. *Anderson,* 117 Cal. App. 763, 1 P. 2d 64, a prosecution for disturbing the peace involving a trade union.

riot at a food depot by applicants for relief. Hawaii had a reported case that did not grow out of a labor dispute (*Republic* v. *Carvalho,* 10 Haw. 446, an unlawful assembly case cited R. 412) but that did not save Hawaii from censure. Evidently upon a mere allegation of denial of equal protection the burden could be placed upon the attorney general of California of digging out unreported cases that did not grow out of labor disputes.

Returning now to the county of Maui and to the thirty years covered by the evidence, and assuming that in that county for that period there was only one previous case in which the unlawful assembly and riot act was invoked and in fact that case grew out of a labor dispute, we proceed to consider the next essential element of proof, that in that county during that period other classes of persons were guilty of comparable offenses and have not been prosecuted under the statute. Plaintiffs in their pleadings undertook to show this and it is an essential element in the proof of a claim of denial of equal protection in the administration of the law, as we have shown. At the trial, the court's rulings showed perfect familiarity with the requirements of proof. Plaintiffs' counsel asked for additional time to show "that there are other incidents when non-union people are involved in serious difficulties where very minor misdemeanor charges are placed against them" (R. 1780). The matter which plaintiffs' counsel wished to go into concerned the city and county of Honolulu (R. 1782). The court ruled:

> "* * * it would seem to me that if you are going to proceed to make proof of the actual status of the handling of criminal cases, misdemeanors, in the Territory of Hawaii, that you would have to do it not by proof of isolated instances, this particular situation, this one to which you refer, but it would have to be more or less done by a presentation of general statistics." (R. 1781-1782.)

The court made no finding on the important question of whether there were other comparable incidents and how they were handled. There was evidence on the part of the defendants that there were no comparable incidents in the county in cases not growing out of labor disputes (R. 1710, covering thirteen years' experience of Police Captain Long (R. 1698); R. 1721-1722, covering twenty years' experience of Police Captain Seabury (R. 1713). Plaintiffs themselves showed that the people of Maui county generally are law-abiding (R. 1697).

A street brawl is nothing but an affray, and is not the same type of offense, as the Supreme Court held.[59] The type of offense which evoked use of the unlawful assembly and riot act in the Maui cases was the deliberate use of mass force and violence in pursuit of an objective of preventing others from working. The lower court agreed with the Supreme Court that the right to work is a precious liberty[60] (R. 467). To establish comparable offenses, similar actions by other groups to terrify their victims into subjection to their will would have to be shown. It does not appear that the employers used such tactics. Hawaii is free of the Ku Klux Klan, and of "protection"-selling rackets. How such tactics as were employed in these cases would have been regarded by a prosecutor more inured to them was not for the court to say.

When the inadequacies of plaintiffs' showing of denial of equal protection are considered, it becomes clear that the court, under the guise of probing the good faith of the prosecution, made unwarranted assumptions. This is developed in point X.

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[59] 37 Haw. at p. 642. An affray is defined by section 11063 of the Revised Laws of Hawaii 1945 as "the unauthorized fighting of two or more persons in a public place."

[60] See *Truax* v. *Raich,* 239 U.S. 33, *Takahashi* v. *Fish and Game Commission,* 334 U.S. 410; *Territory* v. *Kaholokula, supra,* 37 Haw. 625, 642.

VI.

THE COURT ERRED IN ENJOINING PROCEEDINGS IN THE PENDING CRIMINAL PROSECUTIONS, CRIMINAL NOS. 2365, 2412, 2413 AND 2419.

A.

A federal equity court cannot enjoin pending state or territorial criminal prosecutions.

Nature of the intervention by the court below. These cases involve three incidents from which arose four criminal prosecutions, Criminal Nos. 2365, 2412, 2413 and 2419, now pending in the circuit court of the second judicial circuit of the Territory of Hawaii. We shall show that these cases involve nothing other than the pending criminal prosecutions (point VII, *infra*).

The present cases are particularly appropriate for application of the rule that a federal equity court cannot enjoin pending state or territorial criminal prosecutions. Acts which were criminal and which the Constitution permits to be punished as such were charged and were found to have occurred. The plaintiffs' contention is that the Unlawful Assembly and Riot Act and the conspiracy statute cannot be invoked against those acts. Thus they seek to protect themselves from punishment under the particular statutes, not to establish the lawfulness of what they did. Use of equity powers in such a situation is an obvious invasion of the criminal courts.

The full scope of the lower court's intervention becomes clear when the grand jury matter is considered. The defendants in Criminal No. 2365 were allowed to challenge the constitutionality of the grand jury as constituted under valid laws, on the holding that the federal equity court had the power to pass upon the lawfulness of the methods employed by the jury commissioners. If the lower court could hear and decide this issue while it was, by restraining order, holding off a trial under the indictment, it could also hear

and decide it while a trial under the indictment was in progress. It could interrupt a criminal case at any and every stage while it determined whether the trial was proceeding according to the principles of due process of law. The intolerable nature of such a situation is evident.

The doctrine of Cline v. Frink Dairy Co. and Ex parte Young. There is an important distinction between pending state or territorial criminal prosecutions and those which are merely threatened to be brought if a certain course of conduct is continued. Even where a case for equitable relief against *future* prosecutions is established, pending proceedings cannot be enjoined.[61] *Cline* v. *Frink Dairy Co.,* 274 U.S. 445, 452-453; *Ex parte Young,* 209 U.S. 123, 162; *Babcock* v. *Noh,* 99 F. 2d 738, C.A. 9th 1938; *Priceman* v. *Dewey,* 81 F. Supp. 557, 559, D.C. N.Y. 1949; *Society of Good Neighbors* v. *Groat,* 77 F. Supp. 695, D.C. Mich. 1948; *Jewel Tea Co.* v. *Lee's Summit, Mo.,* 198 Fed. 532, D.C. Mo. 1912, affirmed 217 Fed. 965; see *Spence* v. *Cole,* 137 F. 2d 71 as to disposition of the case in the district court. In *Cline* v. *Frink Dairy Co., supra,* the Supreme Court upheld an injunction against future prosecutions on the ground of unconstitutionality of the statute involved, at the same time reversing the court below with respect to the portion of the decree which enjoined a pending prosecution.

The distinction between pending criminal prosecutions and future prosecutions inheres in the statute discussed in part B of this point, but the distinction has even greater significance; in the field of criminal prosecutions the distinction is jurisdictional.[62] Thus for two reasons the lower

[61] The authorities cited in this part A are analyzed in a note in the appendix, pp. 175-181.

[62] The following cases, analyzed in note 61, appendix pp. 177-181, show that the distinction is jurisdictional. *In re Sawyer,* 124 U.S. 200; *Harkrader* v. *Wadley,* 172 U.S. 148; *Ex parte Young,* 209 U.S. 123, 149-166, followed in *Cline* v. *Frink Dairy Co., supra; Broad-Grace Arcade Corp.* v. *Bright,* 284 U.S. 588; *Priceman* v. *Dewey, supra,* 81 F. Supp. 557.

court did not possess the discretion to intervene in the territorial criminal proceedings as it saw fit: (1) it lacked jurisdiction to do so, as submitted in this Part A, and (2) it was prohibited by statute from doing so, as submitted in part B. In the third place as shown in Points IX and X, had the court possessed such discretion it lacked a basis for intervening.

The cases in which injunctions have been granted against future threatened prosecutions constitute no precedent for an injunction against pending prosecutions. Such cases[63] are based upon the jurisdiction of equity to protect from invasion the continued enjoyment of property rights. In the same way threatened future deprivation of such personal rights as freedom of religion and freedom of speech may be made the subject of equitable relief. That the threatened interference with the continued enjoyment of such rights takes the form of a criminal statute is regarded as incidental, since the subject matter before the court is the property right or other affirmative right which the complainant seeks to protect and enjoy. But in so far as pending criminal prosecutions are involved, the subject matter brought before the equity court is solely the validity of such criminal proceedings; only past acts are involved and there is no scope for the protection of equity against future interference with the continued enjoyment of lawful rights. Hence, for equity to act as to pending criminal prosecutions would be to assume the power of the criminal court to quash the charges.

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[63] See the following, all involving threatened, as distinguished from pending, prosecutions. In some of these cases an injunction was granted, in some not. *Philadelphia Co.* v. *Stimson,* 223 U.S. 605, 620-621; *Davis & Farnum Mfg. Co.* v. *Los Angeles,* 189 U.S. 207; *Packard* v. *Banton,* 264 U.S. 140, 143; *Fenner* v. *Boykin,* 271 U.S. 240, 243-244; *Spielman Motor Co.* v. *Dodge,* 295 U.S. 89, 95; *Beal* v. *Missouri-Pacific Railroad Co.,* 312 U.S. 45, 49; *Douglas* v. *Jeannette,* 319 U.S. 157, 163; *Toomer* v. *Witsell,* 334 U.S. 385; *Hynes* v. *Grimes Packing Co.,* 337 U.S. 86, 99; see 1 High on Injunctions, 4th Ed., section 68 at pages 87-88.

B.

A Federal court is prohibited by statute from enjoining pending state or territorial court proceedings.

Preliminary statement. As a matter of statutory prohibition, proceedings that are pending in a state or territorial court, even civil proceedings, are not subject to stay by a federal injunction. The statute, 28 U.S.C. 379, formerly section 265 of the judicial code, now section 2283, has been set forth in a note which also shows the applicability of this statute in the Territory of Hawaii.[64]

Application of the statute to pending cases. The statute does not literally apply unless the state court proceedings sought to be enjoined are pending when the federal equity suit is initiated. 43 Harv. L.R. 345, 375; 42 Yale L.J. 1169, 1191. Hence, cases allowing injunctions against future threatened prosecutions do not constitute exceptions to the statutory prohibition. The court below seems not to have understood this. It cited cases of threatened prosecutions, and even cases where no prosecutions or court proceedings of any kind were involved, on the supposition that they sustained the authority of the court to depart from the statutory prohibition (R. 471-475).

That the statute applies where the state court proceedings have first been begun stems from the origin of the statute in the doctrine of judicial comity.[65] See 43 Harv. L. R., *supra,* at page 363.

The prohibitory effect of the statute; exceptions to the statute. The rule constitutes a positive statutory prohibition against the issuance of injunctions to stay any pending state court proceedings. *Essanay Film Co.* v. *Kane,* 258 U.S. 358, 361; *Toucey* v. *New York Life Insurance Co.,*

[64] See note 19, appendix, pp. 166-168, and see also as to the applicability of the statute in Hawaii pp. 47-48, *supra.*

[65] This Court recently reviewed the principles of judicial comity in *Gregg* v. *Winchester,* 173 F. 2d 512, 517, citing *Stainback* v. *Mo Hock Ke Lok Po,* supra.

314 U.S. 118. While prior to the *Toucey* case there had been several judicial exceptions to the statutory rule, since the *Toucey* case the mandatory character of the statute has been reestablished, subject only to well defined exceptions. The court erred (R. 480) in holding that the Civil Rights Act creates an exception enabling a federal equity court to restrain pending state and territorial criminal prosecutions when it deems the prosecutions not in good faith because of the motives of the prosecutor.[66]

That the instant cases do not fall within any of the exceptions to the statutory prohibition is a conclusion necessarily reached whether these cases are considered in the light of section 265 of the old judicial code, 28 U.S.C. 379, in effect at the time that the cases below were filed and heard, or in the light of the provisions of section 2283 of the new judicial code, in effect when these cases were decided.[67]

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[66] This is presented in Part C of this Point and in Point IX, *infra*.

[67] The first exception made in section 2283 is contained in the words "except as expressly authorized by Act of Congress." The courts already had recognized that Congress might expressly authorize exceptions to the rule against stay of pending proceedings. The statutes creating such exceptions have been enumerated. *Toucey* v. *New York Life Insurance Co., supra,* 314 U.S. 119; *Bowles* v. *Willingham,* 321 U.S. 503. Part C of this Point shows that the Civil Rights Act did not create such an exception.

The second exception mentioned in section 2283 concerns a stay granted by a court of the United States "where necessary in aid of its jurisdiction." This likewise codifies an existing exception, relating to cases where possession of a res is necessary to jurisdiction and the federal court was the first to acquire possession of the res. *Toucey* v. *New York Life Insurance Co.,* supra, 314 U.S. 118, 135. The exception has not been applied to actions in personam. *Mandeville* v. *Canterbury,* 318 U.S. 47, 49; *First National Bank & Trust Co.* v. *Village of Skokie,* 173 F. 2d 1 (C.A. 7th 1949). The exception might be applied where the jurisdiction of the federal court attached first and where the express purpose of the federal action was to enjoin the bringing of the state court action, filed notwithstanding. *Looney* v. *Eastern Texas R.R.,* 247 U.S. 214; *Truax* v. *Raich,* 239 U.S. 33, 36, affirming 219 Fed. 273, 284. This is not the instant case, for the criminal charges were filed first and then the federal court action was brought to quash the pending charges.

(Continued next page)

C.

The Civil Rights Act did not enlarge the equity jurisdiction of federal courts.

The lower court seems to have been of the view that the bringing of the present cases under the Civil Rights Act enlarged the scope of its equity jurisdiction (R. 480). Had Congress, by the Civil Rights Act, enacted an exception to the then existing statute prohibiting injunctions against pending state court proceedings, this would be relevant under the first exception noted in section 2283 of the new judicial code. However, the fact is that in the Civil Rights Act Congress made no such exception.

The statutory prohibition had been in effect since 1793, hence it antedated the Civil Rights Act. Congress expressly provided in the Civil Rights Act that the jurisdiction in civil and criminal matters conferred by the Civil Rights Act "shall be exercised and enforced in conformity with the laws of the United States," and in some instances, "the common law, as modified and changed by the constitution and statutes of the State wherein the court * * * is held."[68] As stated by Mr. Justice Holmes:

Another instance of the application of the exception in aid of jurisdiction is mentioned in the Revisers' Notes on section 2283 where reference is made to the stay of proceedings in state cases removed to the district courts, but this was already deemed an exception made by congressional act. *Toucey* v. *New York Life Insurance Co., supra,* 314 U.S. 118, 133.

The third exception mentioned in section 2283 concerns a stay granted by a court of the United States "to protect or effectuate its judgments." This relates to the power to enjoin relitigation in state courts of cases and controversies already fully adjudicated by federal courts. The Revisers' Notes state that the exception was inserted to grant a power disclaimed by the Supreme Court in the *Toucey* case. It represents the only instance in which section 2283 departs from the *Toucey* case. The exception has no bearing on this case.

[68] R. S. 722, 8 U.S.C.A. § 49a (contained in March 1949 supplement to U.S.C.A.), formerly 28 U.S.C. § 729.

> "* * * the language of § 1979 [8 U.S.C. § 43] does not extend the sphere of equitable jurisdiction in respect of what shall be held an appropriate subject matter for that kind of relief. The words are 'shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.' They allow a suit in equity only when that is the proper proceeding for redress, and they refer to existing standards to determine what is a proper proceeding * * *" (*Giles* v. *Harris,* 189 U.S. 475, 486).

Were the sphere of equitable jurisdiction of the United States district courts extended by R. S. 1979 (8 U.S.C. section 43), such extension would include every alleged deprivation of constitutional rights. The resultant exception to the usual standards would be so broad as to nullify not only section 2283 of the new Title 28 (section 265 of the former judicial code) but also every other rule governing the withholding of injunctive relief. The Supreme Court has applied the usual limitations on the exercise of equity jurisdiction in cases brought under the Civil Rights Act the same as in other cases. For example, to enjoin future prosecutions threatening interference with religious freedom, irreparable injury must be shown as in other cases. *Douglas* v. *Jeannette,* supra, 319 U.S. 157 (See the analysis of this case in note 90, Appendix pp. 186-187).

This Court held in *Alesna* v. *Rice, supra,* 172, F. 2d at p. 179, that if section 2283, formerly 28 U.S.C. section 379, applies in the Territory, the case there presented (which was a civil rights case) presented no congressional exception. There are many cases in other circuits to the same effect, in each of them the statute, then section 265 of the judicial code, 28 U.S.C. section 379, having been applied by a district court in a civil rights case. *United Electrical, R. & M. Workers* v. *Westinghouse Electric Corp.,* 65 F. Supp. 420 (D.C.E.D. Pa., 1946); *Carras* v. *Monaghan,* 65

F. Supp. 658 (D.C.W.D. Pa., 1946); *Mickey* v. *Kansas City,* 43 F. Supp. 739 (D.C.W.D. Mo., 1942); see also *Atlantic Fishermen's Union* v. *Barnes,* 71 F. Supp. 927, 928 (D.C. Mass., 1947); *Davega-City Radio, Inc.* v. *Boland,* 23 F. Supp. 969 (D.C.S.D. N.Y., 1938). That the Civil Rights Act is not an exception to the statutory rule against stay of pending proceedings was expressly held in *Hemsley* v. *Meyers,* 45 Fed. 283, 289-290 (C.C. Kans., 1891); *Aultman & Taylor Co.* v. *Brumfield,* 102 Fed. 7, 12 (C.C.N.D. Ohio, 1900); *Live-Stock Dealers' & Butchers' Assn.* v. *Crescent City Live-Stock Landing & Slaughter-House Co.,* 1 Abb. U.S. 388, 15 Fed. Cas. p. 649, Case No. 8408 (C.C. La., 1870).

In the removal statute, 28 U.S.C. 74, formerly section 31 of the judicial code, now section 1443,[69] Congress expressly legislated under what circumstances the preservation of civil rights in state criminal cases requires federal court adjudication thereon in advance of final judgment. Injunctive relief is proper *in aid of this removal jurisdiction. Toucey* v. *New York Life Insurance Co., supra,* 314 U.S. at p. 133; Reviser's Notes on section 2283. Bills in equity to stay pending state criminal proceedings have been considered as *ancillary to a removal petition,* and as dependant upon the adequacy of the showing made in the removal petition.[70] Many of these removal cases have been presented, though unsuccessfully so, on the very grounds of local prejudice, official misconduct and oppression[71] considered by the court below as indicative of a lack of good faith. The holding of the court below (R. 494-496) is that in the face of the statu-

[69] Appendix, pp. 181-182.

[70] See *Steele* v. *Superior Court,* 164 F. 2d 781, C.A. 9.

[71] See authorities cited in Point IX, pp. 104-105. An example of such a removal petition presented with an ancillary equity bill is the *Lamson* case, *Lamson* v. *Superior Court,* 12 F. Supp. 812, and *People* v. *Lamson,* 12 F. Supp. 813 petition for leave to appeal denied 80 F. 2d 388 (C.A. 9).

tory prohibition a bill in equity confers greater powers of federal court intervention in pending state criminal cases for the protection of civil rights than does the removal statute specifically applicable thereto, it being only necessary, according to this holding, that the petitioner ignore the ancillary nature of such an equity bill, whereupon the federal equity court will find itself free of all statutory limitations on its powers. Compare *Aultman & Taylor Co.* v. *Brumfield,* 102 Fed. 7, 15.

The removal statute, in its provisions for federal court intervention whenever a defendant in a state criminal case "is denied or can not enforce in the judicial tribunals of the State * * any right secured to him by any law providing for * * equal civil rights," contains considerable leeway for a broad interpretation. But the statute has been narrowly applied to cases where the denial of rights is attributable to state laws, not their administration[72] and where the denial is of *equal* rights.[73] We will show in Point IX that this narrow application of the statute has been followed notwithstanding allegations of official misconduct, bad faith, and oppression.

The only other source of jurisdiction of a federal court in state criminal cases lies in the writ of habeas corpus. This power, like the removal statute, has been narrowly limited. Under the "exhaustion of remedies rule" it is well settled that the power of habeas corpus will not be employed by a federal court if the state court proceedings have not ended or further state court proceedings are available, the only exceptions being cases involving the operations of the federal government, the authority of its officers, and foreign relations. *New York* v. *Eno,* 155 U.S. 89; *Ex parte Crouch,*

[72] *Virginia* v. *Rives,* 100 U.S. 313, 319; *Neal* v. *Delaware,* 103 U.S. 370, 386, 393; *Gibson* v. *Mississippi,* 162 U.S. 565, 582; *Murray* v. *Louisiana,* 163 U.S. 101, 105-106; *Kentucky* v. *Powers,* 201 U.S. 1.

[73] *Steele* v. *Superior Court,* supra, 164 F. 2d 781, C.A. 9.

112 U.S. 178; *Ex parte Royall,* 117 U.S. 241, 251; *Whitten* v. *Tomlinson,* 160 U.S. 231; *Mooney* v. *Holohan,* 294 U.S. 103; *Ex parte Hawk,* 321 U.S. 114. The rule applies in Hawaii.[74] Here again it is important to note and we will show in point IX that the narrow application of the habeas corpus power has been followed notwithstanding there were presented contentions of denial of constitutional rights coupled with official misconduct, bad faith, and oppression.

When it is considered that the Supreme Court of the United States could have given a broad application to the two actual powers of federal intervention in pending state criminal cases (removal and habeas corpus) but has declined to do so and has narrowly limited these powers, and when it is considered that the court below gave unlimited scope to a non-existent equity power of intervention expressly prohibited to be used, the error in these cases becomes error of the first magnitude.

VII.

NO CAUSE OF ACTION WAS STATED BY THE UNION OR CLASS REPRESENTATIVES, AND NOTHING IS INVOLVED EXCEPT THE PENDING CRIMINAL PROSECUTIONS.

Threatened further criminal prosecutions not involved; ILWU and class representatives did not state a cause of action. Both the riot act and conspiracy act have been amended, as we have shown. Offenses committed before the amendments remain subject to prosecution under the former laws, but there can be no further prosecutions under those laws. Therefore these cases as they stand today[75] involve nothing except the four pending criminal prosecu-

[74] See note 19, appendix, p. 168.

[75] It is appropriate to consider the present situation under the rule that "an injunction looks to the future." *Douglas* v. *Jeannette,* 319 U.S. 157, 165.

tions, Criminal Nos. 2365, 2412, 2413, and 2419. Moreover these cases have not at any time involved threatened further criminal prosecutions. The court granted no injunction against further prosecutions (Decrees: R. 543-550; No. 12301, R. 89-96). The ILWU and class representatives did not state a cause of action, as will be shown.

Defendants moved for statement of the alleged claims of the individual plaintiffs who are defendants in the pending criminal cases separately (that is in separate counts) from the union and class representatives (R. 112-113; No. 12301, R. 57). If this motion had been granted much confusion would have been saved. In any event, the matter can be simplified to some extent by treating the ILWU and the class representatives as identical.[76] Both will be referred to as "the union."

The union had no legal interest, recognizable as a basis for adjudication, in the pending criminal prosecutions. It was not a defendant in the criminal cases and made no allegation that it was in danger of becoming such. To bring before the court something more than the four pending criminal prosecutions, the union had to present a justiciable controversy as to future prosecutions. The judicial power does not extend to the determination of abstract questions. Presentation of an actual case or controversy requires a specific statement of the activities which the plaintiff is engaged in which are within his rights, and action of a definite and concrete character constituting an actual or threatened interference with those rights. *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 324; *United Public Workers* v. *Mitchell,* 330 U.S. 75, 89-91;

[76] The court below treated both the union and the class representatives as presenting class actions (R. 514-515). The opinion shows that the class representatives, like the union, were treated as presenting a common front. If there was any materiality in the fact that both the union and class representatives sued it was only in connection with jurisdictional amount (*supra,* point I-B).

Watson v. *Buck,* 313 U.S. 387, 400, and cases cited. Not only must an actual case or controversy be presented but also it must be a substantial one. *Ex parte Poresky,* 290 U.S. 30, 31.

To comply with these requirements, the union first of all had to allege and show that its members were threatened with further prosecutions. This had to be alleged with particularity, so as to show "the imminence and immediacy of proposed enforcement, the nature of the threats actually made, and the exceptional and irreparable injury which complainants would sustain if those threats were carried out"; even a general allegation of intent of the defendants to enforce the two criminal statutes would not suffice. *Watson* v. *Buck, supra,* 313 U.S. 387, 398-401; *Ex parte La Prade,* 289 U.S. 444, 455; *Wilder* v. *Reno,* 43 F. Supp 727 (D.C. Pa. 1942); *Pughe* v. *Patton,* 21 F. Supp, 182 (D.C. Tex. 1937).

Secondly, the union had to allege and show what it was doing which brought it within the scope of the threats made, so that it feared further prosecutions. A mere desire to clear the decks of a statute deemed unconstitutionally restrictive would not suffice. It is not the law that labor unions and labor relations have a favored position in the obtaining of adjudications on the validity of statutes. In cases involving labor relations and labor unions, as in other cases, the Supreme Court of the United States has been adamant in its position that it will not pass upon the constitutionality of the statute on allegations that the statute clouds labor relations and hangs like the sword of Damocles over the head of the plaintiff union. A justiciable controversy must be presented. *Federation of Labor* v. *McAdory, supra,* 325 U.S. 450, 460, 470; *United Public Workers* v. *Mitchell, supra,* 330 U.S. 75, 84, 87-91; *United States* v. *Petrillo, supra,* 332 U.S. 1, 9-10. This "sword of Damocles" argument is the same argument of intimidation which was

succinctly disposed of by this Court in *Alesna* v. *Rice, supra.*[77] See also *Atlantic Fishermen's Union* v. *Barnes, supra,* 71 F. Supp. 927, 928 (D.C. Mass. 1947).

Thirdly, to present a justiciable controversy the union must show that the pursuits concretely threatened by further prosecutions were its lawful rights under the Constitution, and hence entitled to protection.[78]

The paucity of the pleadings in these cases is easily understood when the above requirements are considered. Since no threats of further prosecutions had been made, none could be or were alleged. And if the plaintiffs had attempted to spell out a threat of further prosecutions by projecting the past into the future, their case would not have been improved. They were unwilling to take a position as to the past occurrences; their pleadings equivocated as to the past. (Statement of the case, supra, pp. 13-14.) The facts were that plaintiffs had picketed in large numbers[79] without interference by the defendant officers so long as no crimes were committed[80] and that it was the deliberate use of mass force and violence which caused the unlawful

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[77] 172 F. 2d at p. 177, where the court said of the argument of intimidation:

"* * * it is apparent that if it [the prosecution] be lawful, which is the question in issue, no such consequence will follow."

[78] *Supra,* p. 50, quoting Mr. Justice Jackson's statement: "A right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's *cause of action.*"

[79] One of the union's witnesses testified they had as many as 2,000 pickets (R. 1280). Plaintiffs' own exhibit 33, a moving picture film, shows the extent of the picketing which plaintiffs enjoyed so long as it was peaceful.

[80] The court found that prior to the Paia incident there had been but few arrests, one being for assault and battery when a member of the union struck a supervisor, one for malicious injury when a union man was accused of closing an irrigation ditch, and two when union members were charged with pulling the ignition wires from the distributor of a supervisor's automobile (R. 399-400, note 25).

assembly and riot act to be invoked. For plaintiffs to argue that the past would be repeated in the future would only show one of two things, either that plaintiffs' intentions were peaceful, as on the occasions shown in their exhibit 33 (a moving picture film), in which event they were not threatened with further prosecutions under the statutes assailed, or that they were not peaceful, as on the occasions of the Paia, Kaumalapau Wharf and Kalua brothers incidents, in which event, whatever argument might be made as to threats of further prosecutions, plaintiffs were out of court anyway because they did not seek to protect peaceful picketing and did not come into equity with clean hands.[81] In this situation, they attempted no statement of a cause of action.[81a]

Chief of police of Maui county should have been dismissed from the case. Since threatened further criminal prosecutions were not involved, Jean Lane, chief of police of Maui county, a party defendant in No. 12300, appellant here, should have been dismissed. The court erred (R. 519) in denying the motion for his dismissal (R. 129).

Supposed resemblance of these cases to *A. F. of L.* v. *Watson*. Without foundation therefor in the issues in the

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[81] The maxim that "he who comes into equity must come with clean hands" is the subject of point VIII.

[81a] By the amendment of the complaint in No. 12300 plaintiffs added allegations of jurisdictional amount, to conform to the court's then holding that paragraph (14) of section 24 of the old judicial code, 28 U.S.C. 41 (14) now section 1343, did not apply, and in amended paragraph XVIII alleged that the union could not function so long as its members were "subject to prosecution under statutes containing unconstitutional limitations on the right to picket because of the fear and intimidation of the members of said organizations engendered by the threat of punishment for the exercise of these rights guaranteed by the Constitution" (R. 33). Paragraph XXI of the complaint in No. 12301 was the same (No. 12301, R. 24). These allegations of the value of the right to peacefully picket were not backed up by any allegations in the complaint of a continuing threat of punishment for peaceful picketing.

cases,[82] the court went extensively into labor relations in the Territory. Evidence relevant only to jurisdictional amount, and that only because the court erroneously had failed to dismiss the union from the actions in the first place, was embroidered into a case supposedly resembling *A. F. of L.* v. *Watson,* 327 U.S. 582. This supposed resemblance of the present cases to *A. F. of L.* v. *Watson* was one of two grounds deemed by the court below to justify it in invading the jurisdiction of the criminal courts in the pending cases. The other ground, the supposed lack of good faith of the prosecutions, is considered in points IX and X.

Using *A. F. of L.* v. *Watson* as a pattern the lower court held that the impact of the unlawful assembly and riot act and the conspiracy statute, which previously by errors we have discussed the court had held unconstitutional in toto, was "such as to disrupt immediately any substantial possibility or opportunity for genuine collective bargaining between the employers of the sugar and pineapple industries and their respective employees" (R. 477-478). This part of the opinion (R. 477-479, continued at R. 483) shows that the supposed impact of the statutes on labor relations caused the court to be in haste to strike down the statutes, and that the court below distrusted the territorial court's use of the power of punishment contained in the unlawful assembly and riot act.

A. F. of L. v. *Watson* bears no resemblance to these cases. There the bill alleged that the plaintiff labor unions, duly designated collective bargaining representatives, sought to pursue their rights by renewing closed shop agreements, then in existence or about to expire, and by making new such agreements, that the attorney general of Florida held

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[82] We previously have shown that the proceeding was not one arising under the National Labor Relations Act, Labor Management Relations Act 1947, or any other Act of Congress regulating commerce (Point II-B *supra*). And the foregoing shows that the union stated no justiciable controversy.

such agreements violative of a newly adopted Florida constitutional amendment and threatened *quo warranto* proceedings and criminal prosecutions, that plaintiff unions, as duly designated collective bargaining representatives, by virtue of the National Labor Relations Act had the right to use closed shop agreements and had the right to collectively bargain for closed shop agreements, that said rights were granted by said federal law and the Florida law was in conflict with it. Without deciding whether an interlocutory injunction should issue[83] the court held that this bill alleged an imminent threat to an entire system of collective bargaining, involving 500 contracts, affecting 100,000 employees, and that the allegations of the bill merited its retention[84] while state law questions were settled in the state courts. Dismissal of the bill by the district court therefore was reversed. The case involved no pending criminal prosecutions and granted no injunction.

The court's treatment of the impact of the statutes on collective bargaining is wholly unrelated to the actual cases before it. The court seems to have been of the view that no interference by the defendant officers with lawful activities of the union need be actually threatened, for the court says:

> "A strike properly conducted is a legitimate weapon in the armory of labor. Peaceful assembly, peaceful picketing, and freedom of speech and of assembly are equally legitimate weapons of labor." (R. 478.)

[83] 327 U.S. at p. 595, footnote 10.

[84] Subsequently, in *Algoma Plywood Co.* v. *Wisconsin Board,* 336 U.S. 301 (March 7, 1949) the Supreme Court held against the theory of the bill in *A. F. of L.* v. *Watson,* holding that there was no conflict between state regulation of the use of union security agreements (of which the closed shop is a form) and the National Labor Relations Act. At page 305 of this opinion it appears that the language contained in the later Labor Management Relations Act 1947, section 14 (b), which refers to the possibility of a ban on closed shop agreements by a state or territory, was not an essential element of the opinion, the court clearly holding at page 305 that the result was the same under the original National Labor Relations Act which did not contain such language.

Yet the court also said:

> "We do not condone or attempt in any manner to palliate the illegal conduct of the strikers, plaintiffs in these proceedings." (R. 485.)

The court seems to have felt that where union members are concerned a prosecutor must select the criminal statute to be invoked with an eye to avoiding any effect on labor relations. The Supreme Court of the United States has left no doubt that use of force and violence in a labor dispute may be quelled without consideration of the impact on labor relations and without conflict with the Labor Management Relations Act 1947.[85] As might be supposed and as the cases in the Supreme Court of the United States both before and since *A. F. of L.* v. *Watson* have determined, collective bargaining, association of employees in labor organizations, work stoppages, and picketing are not absolute rights.[86]

In fairness to the territorial circuit court it must be said that there was no reason for the lower court's distrust of that court's use of the power of punishment contained in the unlawful assembly and riot act. The lower court assigned none. Plaintiffs' own exhibit 13 (R. 1354-1358) shows the care exerted by the territorial circuit court in such matters. Moreover, there were many other territorial laws[87] bearing on the question of punishment, embodying the modern system of penology. (See *Williams* v. *New York,* 337 U.S. 241, 247-249.) The unlawful assembly and riot act having been amended, and the amendment as to punishment having been made retroactive, this matter does not warrant extensive treatment.

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[85] The authorities are cited in the appendix, pp. 182-184.

[86] Note 85, supra, appendix, p. 182.

[87] Appendix, pp. 174-175, note 41.

VIII.

PLAINTIFFS DID NOT COME INTO EQUITY WITH CLEAN HANDS.

The court granted no injunctive relief against further prosecutions, and as submitted in the previous point, these cases, as they stand today, do not involve and have not at any time involved, a threat of further prosecutions. Nevertheless, the court declined to dismiss the union plaintiff and the class representatives and made much of the threat to labor relations which it thought the statutes, particularly the Unlawful Assembly and Riot Act, entailed. The court recognized that violations of law had occurred and said it did not condone them, but refused to apply the maxim that "he who comes into equity must come with clean hands" (R. 485-486).

Since planned violations of law had occurred, at the very least the principles of equity compelled the union and class representatives to purge themselves by disavowing the authority of the union officials and union police who were leaders in these unlawful activities (statement of the case, pp. 18-20) and by presenting the court with a convincing showing that adequate steps had been taken to prevent the recurrence of such violations. They did nothing of the kind. To the contrary, Jack Hall, regional director for the ILWU, characterized the incidents which occasioned the arrests as "legitimate picket activity," "ordinary picketing," and stated that the union required a determination whether it could be carried on "without being subjected to severe felony charges" (R. 1151-1152).

The court seems to have misunderstood the maxim that "he who comes into equity must come with clean hands" (R. 485-486). It stated:

> "* * * The doctrine of unclean hands is inapplicable here. If it were otherwise no one who had infringed an unconstitutional statute, no matter how irreparable

> the damage resulting from the prosecution and no matter how great and imminent the dangers inherent in the statute's enforcement, could cause a district court of the United States to enjoin prosecution thereunder. The application of the doctrine of unclean hands under the theory enunciated by the defendants would have driven the plaintiffs out of court in A. F. of L. v. Watson and would have had a like effect in Traffic Telephone Workers' Fed. of New Jersey v. Driscoll, *supra.*"

The court's error was a fundamental one, for it failed to perceive the difference between pursuit of activities which, as in the cases cited by the court, are lawful and constitutionally protected unless the statute under attack imposes a valid restraint, and pursuit of conduct which, as in the present cases, irrespective of the constitutionality of the statute under attack is unlawful and not constitutionally protected.

The point is very well developed in an opinion written by Mr. Justice Haney, sitting in a three-judge court, in the case of *Buck* v. *Gallagher,* 36 F. Supp. 405 (W.D. Wash. 1940), appeal dismissed 315 U.S. 780. It was held that ASCAP could not attack the constitutionality of a Washington statute when, irrespective of the constitutionality of that statute, ASCAP was in violation of the Sherman Anti-Trust Act. Other cases to the same effect are *Farr* v. *O'Keefe,* 27 F. Supp. 216 (D.C. Miss.); *Knights of the Ku Klux Klan* v. *Strayer,* 34 F. 2d 432 (C.A. 3d); *American League of the Friends of New Germany* v. *Eastmead,* 116 N.J. Eq. 487, 174 Atl. 156; *Rosenberg* v. *Arrowsmith,* 82 N.J. Eq. 570, 89 Atl. 524. In *Toomer* v. *Witsell,* 334 U.S. 385, 393, it was held that previous convictions for shrimp fishing in inland waters had nothing to do with the lawfulness of fishing in coastal waters, the matter then before the court. But in the present cases, as in the cases above cited, it is the very conduct which occasioned the interference com-

plained of that is unlawful. Nor would the striking down of the statute render it lawful, a point misapprehended by the court below.

It is highly significant that in *Hague* v. *CIO,* 307 U.S. 496, the right to relief was grounded upon the lawfulness of the plaintiffs' conduct. Plaintiffs' bill alleged that "all the activities in which they seek to engage in Jersey City were, and are, to be performed peacefully, without intimidation, fraud, violence or other unlawful methods" (307 U.S. at p. 503). The trial court found that the defendant officers had adopted the deliberate policy of removing the plaintiffs from Jersey City by force and violence "despite the fact that the persons affected were acting in an orderly and peaceful manner" (307 U.S. at pp. 504-505). The Supreme Court considered these allegations and findings a constituent part of the case. They are lacking here.

It is the policy of the federal government not to grant injunctive relief to any party to a labor dispute unless he comes into court with clean hands. That is the basis of section 8 of the Norris-La Guardia Act.[88] Of course that section does not literally apply in the instant cases, since the defendant officers were not "interested in [the] labor disputes" (see 29 U.S.C. 113). Still it is a guidepost for application of the clean hands doctrine, and the plaintiffs fail to meet the test. The Norris-La Guardia Act (section 8, *supra*) requires that an applicant for injunctive relief shall have complied with "any obligation imposed by law which is involved in the labor dispute." In the sugar and pineapple strikes the union failed to comply with its federally enacted obligations in that nonstriking employees were coerced in violation of the Labor-Management Relations Act 1947. *In re ILWU, Sunset Line & Twine Co.,* 79 N.L.R.B. No. 207, Case No. 20-CB-1 (October 22, 1948);

[88] 47 Stat. 72, sec. 8, 29 U.S.C. 108; *Brotherhood of Railroad Trainmen* v. *Toledo, Peoria and Western R.R.,* 321 U.S. 50, 60.

In re Local 1150 United Electrical, Radio & Machine Workers, 84 N.L.R.B. No. 110, Case No. 13-CB-5 (June 30, 1949), cited and explained in note 85, appendix p. 184.

IX.

ASSERTED BAD FAITH OF THE PROSECUTION IS NOT A GROUND FOR FEDERAL COURT INTERVENTION IN A PENDING STATE OR TERRITORIAL CRIMINAL CASE.

The court below placed considerable stress and even greater strain on the following words of Mr. Justice Stone in the case of *Douglas* v. *Jeannette,* 319 U.S. 157, 163: "No person is immune from prosecution in good faith for his alleged criminal acts." This statement does not signify the opposite, that is "everyone is immune from prosecution in bad faith for his alleged criminal acts." The court below so assumed (R. 480). Analysis of Mr. Justice Stone's statement will show that it has no such meaning. The matter will be discussed first as to state and territorial criminal proceedings already initiated and second as to state and territorial criminal prosecutions threatened in the future. We will show that *Douglas* v. *Jeannette* concerned criminal prosecutions threatened in the future and will consider it in the second group of cases.

In point X we analyze the court's finding of lack of good faith of the prosecution and show that it was baseless and unwarranted. Nevertheless the legal arguments made in the present point are of the greatest importance, for if defendants in criminal cases can try the prosecutor in a federal equity court before they themselves can be tried in the state court, there will be an end to the efficacy of law enforcement. Defendants in criminal cases have nothing to lose and everything to gain by so trying the prosecutor. They cannot lose for they cannot be convicted in the federal court, and they are bound to gain delay if nothing else.

Instances of criminal cases initiated before the application for federal court intervention. The quoted statement from *Douglas* v. *Jeannette* does not mean that bad faith of the prosecutor in bringing a criminal prosecution is a ground for federal intervention in pending criminal cases. Obviously this is so where the facts fall short of a defense to the prosecution.[89] But even where the facts constitute a relevant defense, it is not a ground for federal intervention that such defense is coupled with official misconduct, bad faith or oppression.

Federal intervention via equity channels is out of the question because equity has no jurisdiction to intervene in pending criminal cases, there is a statutory prohibition against such intervention, and the statute contains no exception having to do with the good faith of a criminal prosecution (point VI, *supra*). Equitable relief could only be ancillary to removal jurisdiction. In removal and habeas corpus cases jurisdiction does exist and the questions are the limits of such jurisdiction and whether the court will exercise it; cases considering the bad faith of a criminal prosecution as a ground of federal intervention necessarily are chiefly habeas corpus and removal cases.

Many times defendants in criminal cases have come into federal court, and have asserted denial of constitutional rights coupled with official misconduct, bad faith, oppression, discriminatory treatment by state judges, prosecutors and jury foremen, or inability to obtain justice in the state courts because of local prejudice. All such defendants have been sent back to the state courts to present such contentions there subject to appellate review. *Kentucky* v. *Powers*, 201 U.S. 1, is a leading case brought under the removal statute. The petitioner for federal relief had been tried three times as accessory before the fact to a murder. He

[89] Points V and X show that the court below found no facts which would be a defense to the Territory's prosecutions.

claimed that there was "a deliberate purpose on the part of those charged with the administration of justice * * * to take his life, under the forms of law, even if the facts did not establish his guilt of the crime charged." His petition made a strong showing of bitter political animosities working against him to deny validity to a pardon which he held and to exclude members of his political party from the jury. These allegations showed shocking misconduct on the part of the administrative officers connected with petitioner's previous trials according to the Supreme Court. Nevertheless the court ordered the petitioner remanded to the custody of the state authorities. Other such cases are *Snypp* v. *Ohio,* 70 F. 2d 535, C.A. 6, cert. denied 293 U.S. 563; *White* v. *Keown,* 261 Fed. 814 (D.C. Mass.) ; *State* v. *Weinberger,* 38 F. 2d 298 (D.C. N.J.) ; *Lamson* v. *Superior Court,* 12 F. Supp. 812, *People* v. *Lamson,* 12 F. Supp. 813, leave to appeal denied 80 F. 2d 388, C.A. 9; and the many cases concerning grand jury selection cited in note 72, *supra.* In the *Lamson* case, *supra,* Lamson alleged local prejudice and denial of civil rights in the summoning for his third trial of jurors called at two previous trials. He presented a bill in equity seeking an injunction against continuance of his third trial and a removal petition. The court viewed the equity complaint as ancillary to the removal petition, which it held insufficient. The notion that in the face of the statutory prohibition (point VI-B, *supra*) a bill in equity confers greater power for the protection of civil rights in pending state criminal cases than does the removal statute designed for that purpose, is unique in the court below (R. 495).

Mooney v. *Holohan,* 294 U.S. 103, is a leading habeas corpus case. The petitioner alleged that his conviction had been obtained by the knowing use of perjured testimony and the deliberate suppression of rebuttal testimony. The Supreme Court, while holding that this would constitute

a denial of due process if true, held that further state court proceedings were available in the form of a petition for habeas corpus and that further recourse must be had to the state court. Similar cases are *Ex parte Hawk,* 321 U.S. 114, 116; *United States ex rel Steel* v. *Jackson,* 171 F. 2d 432 (C.A. 2d 1948); *Sharpe* v. *Buchanan,* 121 F. 2d 448 (C.A. 6th 1941); and *Sweet* v. *Howard,* 155 F. 2d 715 (C.A. 7th 1946). The most recent habeas corpus case is *Dye* v. *Johnson,* No. 332 of the October 1949 term of the Supreme Court, decided November 7, 1949, 338 U.S. 864, in which the Supreme Court granted a petition for certiorari and at the same time, on the authority of *Ex parte Hawk, supra,* summarily reversed the opinion below, rendered by the court of appeals for the third circuit and written by Chief Judge Biggs who wrote the opinion of the lower court in the present cases. As reported in 175 F. 2d 250, the petition alleged that at the petitioner's Georgia trial perjured coerced testimony was used against him to the knowledge of Georgia officers, that following his conviction he was committed to a chain gang and was a victim of cruel, barbaric and inhuman treatment, and that if extradited to Georgia his life would be endangered by mob violence and by the brutality of his jailers. The court of appeals held that petitioner had been subjected to cruel and unusual punishment in violation of the Constitution, and that there was no necessity of exhausting state remedies in an extradition case. It will be noted that in its summary reversal of this opinion the Supreme Court of the United States adhered to the exhaustion of remedies rule.

Society of Good Neighbors v. *Groat,* 77 F. Supp. 695 (D.C.E.D. Mich. 1948), is an equity case decided by a three-judge court. The Michigan statute providing for the investigation of suspected offenses by a judge (referred to in Michigan as a one-man grand jury) was attacked as unconstitutional. It was alleged that the judge acting as such

one-man grand jury, the prosecuting attorney, and the police commissioner had entered into a conspiracy to destroy the plaintiff organization and that this conspiracy had prompted the proceedings complained of, also that the plaintiff organization was being crippled by being deprived of its books and records. The court held on the authority of section 265 of the judicial code, 28 U.S.C. 379, now section 2283 (*supra,* point VI-B), *Cline* v. *Frink Dairy Co.,* (*supra,* point VI-A), and *Ex parte Hawk, supra,* that the plaintiff organization must exhaust its remedies under the state law. See also the equity case of *East Coast Lumber Terminal Inc.* v. *Town of Babylon,* 174 F. 2d 106, 112 (C.A. 2d 1949), affirming 81 F. Supp. 701, the facts appearing from the trial court's opinion at p. 702.

Even where the criminal proceeding asserted to be in bad faith is a federal prosecution, allegations of official misconduct have not been deemed grounds for collateral intervention. Thus in *Glasgow* v. *Moyer,* 225 U.S. 420, a federal prisoner sought his discharge by a writ of habeas corpus, alleging unconstitutionality and uncertainty of the federal statute under which he was indicted, illegal search and seizure, mistreatment while in custody, and trial before an illegally selected jury. The Supreme Court pointed out (225 U.S. at p. 229) that much the same petition had been presented before trial and had been refused then, that the orderly procedure was for petitioner to set up his defenses of fact and law in the criminal proceeding and then seek appellate review, and that it made no difference that unconstitutionality and uncertainty of the criminal statute were asserted. As said in *Dorsey* v. *Gill,* 148 F. 2d 857, 877 (App. D.C. 1945), cert. denied 325 U.S. 890, referring to alleged misconduct of the police:

> "* * * Power to grant such a writ [habeas corpus] * * * is not to be used as an indirect mode of disciplining misconduct."

See also *Young* v. *Sanford,* 147 F. 2d 1007 (C.A. 5th 1945), cert. denied 325 U.S. 886, and cases there cited.

The foregoing authorities demonstrate that the statement from *Douglas* v. *Jeannette* quoted at the beginning of this point, i.e., "No person is immune from prosecution in good faith for his alleged criminal acts," does not call for application of the reverse statement that "everyone is immune from prosecution in bad faith for his alleged criminal acts." Some rational explanation of the *Douglas* v. *Jeannette* statement is called for. We proceed now to consider the cases having to do with threatened future criminal prosecutions, including the *Jeannette* case.

Cases of threatened future criminal prosecutions. The quoted statement was introduced into the cases following the date of the *Hague* case. Prior to that time the general statement was that equity will not enjoin criminal prosecutions even under an invalid statute, except where necessary to protect property rights from irreparable injury. (Beyond dispute, in modern times the exercise of personal rights also may be protected from invasion but that does not change the fundamental problem.)

We have set forth in a note[90] a chronological analysis of the cases in the United States Supreme Court stating the rule that no one is immune from a criminal prosecution brought in good faith. All such cases involve threatened (not pending) criminal prosecutions. We have started the analysis with the *Hague* case because it is the keystone of the rule (although the "good faith" rule was not set forth in so many words in the *Hague* case), and have ended it with *Douglas* v. *Jeannette* where the foundation of the rule in the *Hague* case is stated in the court's opinion. The analysis shows: (1) The rule presupposes that the plaintiff has shown an actual threat of interference with the continued enjoyment

[90] Appendix, pp. 184-187.

of a lawful property right or other lawful constitutionally protected right.[91] (Plaintiffs have not established a threat to invoke the statute against peaceful picketing, and the court erroneously proceeded on the hypothesis that the unlawfulness of plaintiffs' conduct was immaterial.) (2) If the plaintiff has established the first proposition (these plaintiffs did not), he must further show that irreparable injury will be inflicted on him in the enjoyment of his lawful constitutionally protected rights if he does not have the aid of a court of equity. Imminence of a threatened criminal prosecution, even under an allegedly invalid statute, is not of itself irreparable injury, because the necessity of litigating the constitutional issues in the criminal court is not such injury. But under the "good faith" rule a so-called prosecution which will not in fact afford an opportunity to obtain an adjudication of the constitutional issues does constitute irreparable injury. For example, in the *Hague* case, where the law was being used as a means to deport persons without any intention of bringing them before the criminal courts, there could be no adjudication on the constitutional issue in the criminal courts.

Hence, the statement that "no one is immune from prosecution in good faith" means that no one is guaranteed against the prospect of having to present and have adjudicated his contentions in the criminal court. The rule is simply a way of stating that when the criminal court is an available forum, it does not lie with the person threatened with prosecution to choose another forum. Here the gravamen of plaintiffs' complaint was that the criminal cases would proceed and the criminal court would err; they had a forum but were looking for a more favorable one. The rule in any event is irrelevant in these cases because no future threatened criminal prosecutions are involved, and the rule has nothing to do with pending criminal prosecutions.

[91] See cases cited in note 63, supra.

X.

THE COURT ERRED IN ITS FINDING THAT THE CRIMINAL PROSECUTIONS WERE NOT IN GOOD FAITH.

Preliminary statement. The court should have made no finding concerning the good faith of the prosecutions, as already has been submitted. Such a finding was not relevant in these cases (points VI and IX, *supra*) nor was it called for by the pleadings (Statement of the case, *supra,* pp. 15-17). Nevertheless the court did make a finding, and we devote this part of the argument to analysis of it. Each subsidiary matter will be considered after consideration of the general picture. We intend to show that the court committed unwarranted invasions of the executive and legislative departments (just as its disposition of the pending territorial criminal prosecutions was an unwarranted invasion of the territorial judicial department), that it found facts not in issue, assumed facts without finding them and without any basis therefor, relied on inadmissible evidence, and made other findings by abuse of the doctrine of judicial notice.

Motives of the prosecutor are irrelevant; assumption of supervisory authority by the trial court. The court stated that the words "in good faith" are "intended to draw a line between bona fide prosecutions embarked upon to uphold the law and prosecutions for some ulterior purpose or motive" (R. 480). The court conceded that "the motive of the prosecutor is of course not relevant to the ordinary criminal proceeding" (R. 480), but then proceeded to hold that motives are relevant to good faith under the Civil Rights Act, "in connection with the exercise of the discretion of a district court of the United States to restrain such criminal actions" (R. 480). The conclusion reached by the court was that "the unlawful assembly and riot act has been employed as a club to beat labor and that the conspiracy statute is an apt instrument to the same end" (R. 482).

The court of course was correct in stating that the motive of the prosecutor is not relevant to a criminal proceeding. See *People* v. *Yuen,* 32 Cal. App. 2d 151, 89 P. 2d 438, 442, 90 P. 2d 291, a riot case arising out of a labor dispute.[92] To make a defense out of the prosecutor's reasons for the prosecution one would, at the very least, have to make out a complete case of denial of equal protection, which plaintiffs failed to do (point V, *supra*) . As to the court's reference to the Civil Rights Act, we have shown that said Act did not confer on a federal equity court the authority to intervene in pending state criminal cases (point VI, *supra*) .

By its finding of an ulterior purpose to beat labor the court rejected the conclusion that the prosecutions were for the purpose of upholding the law. But the court did not find that the plaintiffs were conducting themselves lawfully and in fact found the opposite. We will show that the court rejected the conclusion that the prosecutions were for the purpose of upholding the law because the court thought the measures taken by the prosecutor too stringent; the court was insistent that a misdemeanor statute be used. From its disagreement with the stringency of the measures taken the court inferred an ulterior purpose. By this means, the court assumed a supervisory authority over the prosecutor which the court did not possess. Even over the United States attorney the court does not possess supervisory authority to determine whether a prosecution is oppressive or unfair. *District of Columbia* v. *Buckley,* 128 F. 2d 17, 20-21 (App. D.C. 1942) ; *United States* v. *Thompson,* 251 U.S. 407, 412-414. By statute[93] a

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[92] See also *Everett* v. *State,* 26 Ala. App. 502, 163 So. 667, cert. denied 231 Ala. 110, 163 So. 667.

[93] Section 10830, Revised Laws of Hawaii 1945, provides:

"**Sec. 10830. Nolle prosequi.** No nolle prosequi shall be entered in a criminal case in a court of record except by consent of the court upon written motion of the prosecuting attorney stating the reasons therefor. The court may deny such motion if it deems such reasons insufficient and if, upon further investigation, it

circuit court of the Territory possesses certain authority over the prosecuting attorney which a federal court does not possess over the United States attorney,[94] but naturally the local statute does not enlarge the powers of the federal court over territorial law enforcement officers.

People of the Territory on trial; the pattern of the precedent set by the lower court's opinion. There were no allegations, evidence, or findings of any conspiracy or concert of action between the prosecuting officers and the employers[95] or anyone else. To support the conclusion that the prosecutions were being carried on for the purpose of attack upon a labor movement, the court seems to have supposed that there is a "mores" of the community (R. 482) which has been the same throughout the life of the Territory, takes the place of evidence as to the purpose of the prosecutions, and is equally applicable to all parts of the Territory and all of the law enforcement officers who have served from time to time (R. 481-482, 388-390). Such simplicity of treatment may be convenient, but it does not represent the judicial process.

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decides that the prosecution should continue, it may, if in its opinion the interests of justice require it, appoint a special prosecutor to conduct the case and allow him a fee. The proviso of section 10685 relative to fees allowed counsel assigned by the court for a defendant is made applicable to fees of special prosecutors appointed hereunder."

[94] Compare *United States* v. *Brokaw*, 60 F. Supp. 100 (D.C. Ill. 1945).

[95] The defendants in the criminal cases, plaintiffs here, had not even been discharged from their employment; it was stipulated that those involved in the Paia incident who were employees of Maui Agricultural Company were still so employed (No. 12301, R. 81) and that those involved in the two Lanai incidents who were employees of Hawaiian Pineapple Company were still so employed (R. 338).

The court's treatment of the "mores" of the community levels a scathing impeachment against the people of the Territory. The court states that "the criminal proceedings complained of are being carried on for the purpose of attack upon a labor movement rather than for the ends of justice" and in the same breath states that "we do not accuse the Attorney General of Hawaii or the prosecuting officers of Maui County * * * of lack of honor or of personal integrity. The labor movement is an unpopular one in the Hawaiian Islands and these gentlemen do no more than reflect the mores of their time and their locality" (R. 482). The defendants did not know that the people of the Territory were on trial or what were the charges against them. The court itself remarked during the trial: "We are not trying Maui County here. We have no power to try a county and don't propose to" (R. 1711). Of course this was a correct statement; inquiries of that nature pertain to the legislative and executive branches of government. Many congressional committees have voluminously investigated Hawaiian affairs. It is curious that the court made no reference to these reports. They find that by 1946 labor-management relations were progressing satisfactorily and the position of labor in the Territory was good.[96]

Should the kind of treatment given to the Territory's criminal cases in the court below be sustained by this Court, the result will be that no criminal case arising out of a labor dispute can be disposed of without a pretrial in a federal court. The union need not even plead its charges

[96] Report of the subcommittee of the committee on territories, House of Representatives, 79th Cong., 2d Sess., pp. 546-550c of the printed hearings before the subcommittee held in Hawaii in January 1946, pursuant to H.R. Res. 236 of the 79th Cong., 2d Sess. Pertinent findings and conclusions in the subcommittee's report are findings 30-38 and conclusions 12-13. The subcommittee's report was accepted by the full committee and made Appendix 4 of its report on the Hawaii statehood bill, H.R. Rep. No. 194, 80th Cong., 1st Sess., H.R. Rep. 254, 81st Cong., 1st Sess.

against the prosecutor. It need only assert constitutional issues, and that the measures taken by the prosecutor are unsuitable, from which the federal court will deduce bad motives of the prosecutor if there is any background of tense labor relations (R. 482, 388). Certainly as good or better documentary material exists for taking judicial notice of tense labor relations outside Hawaii,[97] as was used by the court below to excuse its intervention in Hawaii's criminal cases. So this piece of the pattern will not be missing.

Abuse of the doctrine of judicial notice. The court abused the doctrine of judicial notice in this branch of the case. Judicial notice may be used only where "the matter clearly falls within the domain of the indisputable."[98] The facts assumed by the court in this case clearly did not have the certainty required for judicial notice, particularly the assumption that labor-management relations in Hawaii have had unchanging characteristics over the past twenty-five years (R. 388, 482). How can a court assume such to be an indisputable fact when (1) the department of labor's report on the economy of Hawaii in 1947, prepared and transmitted to Congress pursuant to section 76 of the Hawaiian Organic Act (29 U.S.C. 7) states that fundamental changes were wrought by the war in the character of labor-management relations;[99] (2) the congressional committee reports on Hawaii cited in footnote 96, *supra,* are to the same effect; and (3) comparison of other congressional

[97] See the Report of the Joint Committee on Labor-Management Relations in the West Coast Maritime Industry, made pursuant to section 401 of the Labor-Management Relations Act 1947, Public 101, 80th Cong., 1st Sess., 61 Stat. 160, being Senate Report 986, Part 5, 80th Cong., 2d Sess. The report deals with the ILWU outside Hawaii. See pages 2, 14, 35-36, 55-57, 63-65 for general material and pages 10-13, 57-60, and 66 with particular reference to the ILWU.

[98] 57 Harv. L.R. 269, 293; 20 Am. Jur. 50, sec. 19.

[99] Bulletin No. 926, United States Department of Labor, "The Economy of Hawaii in 1947," p. 180.

committee reports on Hawaii and the congressional committee report concerning the west coast cited in footnote 97, *supra,* show present day similarity in the problems of Hawaii and the west coast.[100]

At the conclusion of summing up the court asked counsel "to include in their briefs all *reported* decisions in the territorial courts or in this Court respecting picketing or contempt proceedings arising under alleged violations or actual violations of picketing" (R. 1938-1939, italics added). The attorney general complied. Plaintiffs' counsel, two days before the attorney general's reply memorandum was due, filed as an addition to her brief a memorandum of 38 legal size pages entitled "Memorandum on history of labor and the law in the Territory of Hawaii," 33 pages

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[100] See the topic "Political incompatibility," pages 57-61 of the report dealing with the west coast, *supra,* note 97, where the communist question is discussed, and compare, infra, the report of Senator Cordon made in 1948, a considerable period after the date of the criminal prosecutions but prior to the hearing below.

Senator Cordon's report is the first mention of the communist question in the congressional committee material dealing with Hawaii. Senator Cordon, chairman of the subcommittee on territories and insular affairs, filed this report with the full senate committee on April 2, 1948, 80th Cong., 2d Sess., based on hearings held in Hawaii in January 1948 and in Washington in April 1948. It is noteworthy that at the hearing held by Senator Cordon labor itself made charges of communist influence. See the A. F. of L. charges made against the ILWU. (Report of hearings before the subcommittee on territories and insular affairs of the committee on public lands, United States Senate, 80th Cong., 2d Sess., on H.R. 49, p. 27.) Senator Cordon concluded that the communist question was no different in Hawaii than elsewhere, but Senator Butler has opposed statehood for Hawaii on the basis of the communist question. See Congressional Record of May 20, 1948, 80th Cong., 2d Sess., Vol 94, pp. 6313-6330; Report of June 21, 1949, Vol. 95, Cong. Rec. No. 112, p. 8328. It is opposition of this character, and not dissatisfaction of Congress with labor relations or other aspects of Hawaii as a modern American community, which has held Hawaii back in its ambitions for statehood.

It is likely that in the near future there will be another congressional committee investigation in Hawaii.

of which were devoted to the period from 1850 up to the time of the sugar and pineapple strikes, 3 pages were devoted to those strikes but by no means confined to the record, and 2 pages were devoted to other matters outside the record. The attorney general assumed that the court would confine itself to the times involved and to the record, but that does not seem to have been the case.

Land ownership; haoles. Hawaii's land ownership problems were brought into the picture by the court (R. 382-383). The only possible relevancy is in connection with the fact that the sugar and pineapple industries are examples of industrialized agriculture. This has nothing to do with land ownership; as a matter of fact the authority cited by the court shows that nearly half the land in sugar production is leased.[101] In fairness to the people of Hawaii it should be stated that Congress itself removed the limitation on corporate land holdings contained in the original Hawaiian Organic Act.[102]

The court identified the entrepreneur, landowning, land-controlling group with the haole group, using "haole" as a mark of rank (R. 387-388). Here again the court fails to consider whether there is anything unique in the situation. The authorities cited by the court show that there has always been a tendency on the part of people of old American stock

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[101] Of the ten largest private owners, mentioned by the court, the largest is the Bishop Estate, a charitable trust. 1946 statehood hearings cited *supra,* note 96, at page 548 (paragraphs 13 and 14) and page 762.

[102] Section 55 of the Hawaiian Organic Act, as originally enacted, 31 Stat. 141, c. 339, contained the following, which was deleted by the Act of July 9, 1921, 42 Stat. 116, c. 42, s. 302.

> "*Provided,* that no corporation, domestic or foreign, shall acquire and hold real estate in Hawaii in excess of one thousand acres; and all real estate acquired or held by such corporation or association contrary hereto shall be forfeited and escheat to the United States, but existing vested rights in real estate shall not be impaired."

to assume superiority over newer immigrants, but in Hawaii there has been less stress resulting therefrom than in most places; racial relationships have been exceptionally good.[103] The important thing is that:

> "To a far greater degree than in most other regions of European settlement, Hawaii has established and maintained the capitalistic principle of freedom—freedom to compete for a place in the economic order, irrespective of race and origin. The several immigrant peoples, which have in turn started life on the lower levels of plantation labor, all have risen to higher places in the occupational pyramid as rapidly as conditions would permit. * * *"[104]

In any event there was no relevancy in remarking upon "extreme measures whether undertaken by the employees or by the employers" (R. 388). These cases were brought by government officers. The court found no concert of action between those officers and the employers. There is no haole dominance in the holding of government offices.[105]

1929 amendment of the unlawful assembly and riot act. We have pointed out that the court did not hold unconstitutional the twenty years' maximum punishment, contained in the unlawful assembly and riot act prior to the 1949 amendment (point III-C, pp. 70-71). The court said this provision was "among the statute's disabilities" (R. 460).

Instead of squarely facing the issue as to the constitutionality of this provision the court went to the newspapers

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[103] Adams, Interracial Marriage in Hawaii, pp. 119-120; Burrows, Hawaiian Americans, pp. 208-209; Lind, An Island Community, pp. 273-274.

[104] Lind, An Island Community, *supra,* p. 245.

[105] It is interesting to note that Joseph Kaholokula, a union official, defendant in Criminal No. 2365 and a plaintiff in No. 12301, was at the time of the trial a member of the territorial legislature (R. 1236).

of twenty-five years ago to infer the reasons for the 1929 amendment (R. 388-390). The court referred (R. 388) to a riot at Hanapepe on the island of Kauai in which 20 persons were killed, said that this riot arose out of a labor dispute, and inferred that the sentences imposed on the participants had expired just as the legislature convened in 1929 "and there was evident fear that when these men returned to their people on Kauai some form of demonstration or labor trouble might result" (R. 390). This is one of the factors (R. 482) which led the court to infer lack of good faith of the prosecuting officers, more than 20 years later.

It is evident that a very serious riot did occur in 1924. Where persons are killed in a riot some states[106] make every person guilty of participating in the riot punishable in the same manner as a principal in such homicide. Of course a statute which does not differentiate between the objects or effects of the riot is not the same as one that does; undoubtedly very great leeway was given to the court by the 1929 amendment, which later was affected by the indeterminate sentence law as we have shown (note 41, appendix p. 174). But the policy of the statute was not for the court.[107] The legislature was the judge of the gravity of the offense, and the purpose to deter the recurrence of such offenses, if such was its purpose, was a valid purpose.[108]

Employment of privately paid special prosecutors in 1924. The court remarks that the 1924 riot prosecutions were conducted by a special prosecutor "employed, albeit

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[106] Oregon Compiled Laws 1940, sec. 23-802, Appendix VI, p. 209; North Dakota Revised Code 1943, sec. 12-1904; South Dakota Code of 1939, sec. 13-404.

[107] *Daniel* v. *Family Security Life Insurance Co.,* 336 U.S. 220; *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541, 550; *Goesaert* v. *Cleary,* 335 U.S. 464, 466-467; *Dominion Hotel* v. *State of Arizona,* 249 U.S. 265.

[108] *Howard* v. *Fleming,* 191 U.S. 126, 136; *Collins* v. *Johnston,* 237 U.S. 502, 510; *Pennsylvania* v. *Ashe,* 302 U.S. 51, 54-55.

in the name of the Territory, by the planters" (R. 389). Here again the court treats as unique to Hawaii, what in fact is not unique. Many states follow the practice of allowing private counsel to assist the prosecution. 18 C.J. 1336, sec. 79; 27 C.J.S. 433, sec. 28b; 42 Am. Jur. 241, sec. 10. We agree that the practice is undesirable in cases growing out of labor disputes. No counsel employed by any private party was employed as special prosecutor in any of the criminal prosecutions here involved, or in any of the other criminal proceedings arising out of the sugar and pineapple strikes. The matter is wholly irrelevant.

Findings of interference with ILWU's success in strike action by reason of enforcement of unlawful assembly and riot act and the conspiracy statute. The court found true certain statements of Jack W. Hall, which are reviewed below. These statements were mere conclusions as to the effect of the criminal proceedings, and the court erred in giving credence to these conclusions.

The first such statement by Jack W. Hall concerns the charges made during the sugar strike under the unlawful assembly and riot act. Mr. Hall conceded that the use of the statute did not affect the success of the sugar strike (R. 1151). The court found that the sugar strike was won by the union (R. 391). The record shows that picketing continued all during the sugar strike all over Maui, except as restricted at Paia by reason of the temporary restraining order involved in the case of *ILWU* v. *Wirtz*[108a] (R. 1173-1177, 1659-1660, 1709-1710). The union also picketed during the pineapple strike (R. 1178, 1633-1634).

As to the pineapple strike, the court found: "This strike was lost by the union primarily because of the enforcement of the unlawful assembly and riot act" (R. 391). The

[108a] 170 F. 2d 183 (C.A. 9th), cert. denied 336 U.S. 919, No. 11568 in this Court.

court based this on Jack W. Hall's statement (R. 382) which was as follows:

> "Q. Did it [the Unlawful Assembly Statute] have any effect on the pineapple dispute?
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> "A. I think it was perhaps the major factor which caused us to lose the strike. I was, in pineapple as in sugar, in all discussions involving around the strategy of the union from day to day, and when the strike leaders on Lanai were arrested along with a large number of the workers and faced with these severe penalties, the workers on all islands were very much affected and felt that it would be impossible to win the strike facing constant mass arrest, and therefore it became the judgment of the strike committee in which I participated that the strike should be called off at once until a determination was made on whether ordinary picketing could be carried on in this Territory without being subjected to severe felony charges."
>
> (R. 1151-1152.)

It will be observed that Mr. Hall testified "the strike leaders on Lanai were arrested along with a large number of the workers." His testimony was that the union could not win the strike facing "constant mass arrest" under "severe felony charges." The fact is that in Criminal No. 2413 only eleven arrests were made as a result of the Kaumalapau Wharf incident out of well over 100 persons involved, and in Criminal No. 2412 only five arrests were made as a result of the Kalua incident. These were the only arrests under the unlawful assembly and riot act until August 1, 1947, when a large number of arrests was made in Criminal No. 2419. *That was more than two weeks after the pineapple strike was over.* Moreover, Mr. Hall testified that "the workers on all islands" were very much affected by the Lanai arrests "and therefore it became the judgment of the strike committee in which I participated that the strike should be called off." This is sheer impossibility. According to plaintiffs' own allegations (R. 9) the Lanai

arrests (other than those above mentioned which came two weeks after the strike was over), were made on the day that the strike ended. The strike strategy committee could not have acted on the basis of the reactions of "the workers on all islands" to these arrests. The inescapable conclusion is that the pineapple strike was not lost for any of the reasons given by Mr. Hall.

We already have called to the attention of the court the irrelevancy of this whole line of testimony. The union did not have the right to win the strike by such tactics as were displayed at Kaumalapau Wharf and in the ambush at the Kalua brothers' room. That was not "ordinary picketing," no matter how characterized by Mr. Hall. It was not "a strike properly conducted" which the court refers to as a legitimate weapon in the armory of labor (R. 478).

The last of Mr. Hall's testimony, to which the court gave credence, concerned a contemplated longshoremen's strike. Mr. Hall testified:

> "* * * The longshoremen under their present contracts with the waterfront employers had a recent wage opening and at that time attempted to raise the wage rates for longshoremen in the Territory to the wage rates on the mainland, the longshoremen in Hawaii being the lowest paid in any American seaport. The membership was extremely militated by the negotiating committee when it got together in the face of the employers' refusal to bring the wage structure up in the Territory and had to make a decision on whether or not to accept the employers' proposal or to strike, arbitration being refused, and in the discussion with the negotiating committee we had to come to the conclusion that it would be in effect suicide for the union to attempt to strike with such a statute hanging over their heads, a statute that could easily be invoked and has been in our opinion, or where there have been minor disturbances that might have been provoked by agents provocateur." (R. 1153-1154.)

This testimony was objected to as purely speculative (R. 1153) and obviously was. It was error to receive it. Nothing could be more speculative or baseless than the assumption that the statute might be invoked because of minor disturbances provoked by agents provocateur.

As to the conspiracy statute, mentioned by the court (R. 381), that did not come into the picture until long after the sugar and pineapple strikes were over, and was not mentioned by any witness as a cause of fear.

Incidents which the court held should have been prosecuted under the assault and battery statute. The court said that the Unlawful Assembly and Riot Act was inappropriate in connection with the Kalua brothers and the Yamauchi incidents, and that a statute like the assault and battery statute would have been employed "if the motive for prosecution had been only the maintenance of good order in the community and the punishment of minor law breakers" (R. 411). This bears out our previous statement that the court was insistent upon the use of a misdemeanor statute. At page 481 it is revealed that "the repeated selection of the unlawful assembly and riot act with its heavy penalties as vehicles for the prosecution of comparatively minor infractions of the criminal laws" was deemed by the court to constitute bad faith.

This is an instance of the court's arrogation of supervisory authority. We have shown that a federal court does not have such authority even over the United States attorney. Obviously if bad motives can be held relevant to the prosecution and then inferred from disagreement with a prosecutor's exercise of his discretion as to the criminal statute to be invoked, the prosecutor's discretion no longer is his own.

The treatment which the strikers handed out to the Kalua brothers was a very serious abuse of freedom. They had a right to work, even if they were strikebreakers; this

was a liberty[109] protected by the Constitution. For twenty-five men to go to the place of abode of two others, ambush them as they arose from their beds, and beat them up with the object of terrifying them into subjection to the will of the attackers was something more than an ordinary assault and battery. If such acts had been perpetrated by organized gangsters seeking protection money or by the Ku Klux Klan seeking to terrorize negroes who had "white man's jobs," the difference between this and a street brawl would be clear enough. The difference remains though the acts were committed by union members.

The Yamauchi incident took place during the sugar strike. Yamauchi was strike strategy committee foreman for the union (R. 1216). He made a statement to the police in which he admitted sending eight cars of men out to gang up on three individuals, Backman, Nelson and Wright, reported to him to be irrigating the sugar cane. Yamauchi told his men if those who were irrigating would not go home, to take off their clothes. He also told his men that if the men irrigating should fight against them to use their own judgment. He afterwards was informed that his men beat up one of the men irrigating and gave another a licking (R. 1763-1774). The court found that Yamauchi's acts "were a contributing, if not the primary, cause of an assault and battery" (R. 401). Again the court did not take seriously the ganging up of eight cars of men on three persons. The prosecutor did. The incident was not involved in these cases and had been disposed of before these suits were brought, as found by the court (R. 402). It was brought into the record over the objections of the defendants (R. 1192) and was irrelevant.

Disagreement between the police and the deputy county attorney as to the charges to be used. The court remarks

[109] See point V, footnote 60, *supra*, and see *In re ILWU, Sunset Line & Twine Co.*, 79 N.L.R.B. No. 207, note 85, Appendix p. 184.

on the fact that Assistant Chief of Police Freitas of Maui County had no intention of invoking the Unlawful Assembly and Riot Act at the time of the Paia incident[110] (R. 398-399) and he read to the crowd there from the loitering law (R. 393-394). It is worthy of note that a copy of the Unlawful Assembly and Riot Act had been circulated with other laws before the strike.[111]

There was evidence that the strikers at Paia meant to go as far as necessary to stop the return to work of the five men seeking entrance to the mill.[112] And it certainly was not a foregone conclusion that the push of the massed group of over 200 persons against the small group of men and police would recede when Freitas called out that the men were going back to their side of the street, for a force so started cannot always be stopped. But it was a foregone conclusion what would have happened had Freitas acted differently.

A prosecuting officer, in determining what charges are to be brought, obviously is not bound by an on-the-spot

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[110] The court also says there was no intention on the part of Assistant Chief of Police Freitas to use the Unlawful Assembly and Riot Act at the time of the Kaumalapau Wharf incident (R. 481). There is no evidence to support this. Assistant Chief Freitas yelled at Barbosa's men to stop. Obviously he did not have time to read the Riot Act, so sudden was the rush of men onto the wharf. He had only five men with him and was helpless (R. 1617, 1614).

As to the Court's statement (R. 481) that no arrests were made during the course of the Paia or Kaumalapau incidents, surely the court does not mean to infer that the police intended to make no arrests for such incidents.

[111] R. 1653-1654, 1274, referring to plaintiffs' exhibit 11, which contained the Unlawful Assembly and Riot Law but was not printed in full. Appellant asked that the printed record describe the contents of this exhibit (R. 1966-1967); it was not so printed but the contents sufficiently appear from Mrs. Bouslog's statement at R. 1276.

[112] See the court's findings at R. 392-393 that in preliminary conversations Kaholokula (an officer of the union, R. 1237) stated that if the five men tried to cross the picket line there would be violence and bloodshed "police or no police."

decision of a police officer. The loitering law is quoted in footnote 20 of the court's opinion (R. 393-394) where the court remarks it to be very similar in tenor to that held unconstitutional in *Territory* v. *Anduha,* 48 F. 2d 171. Whether or not the legislature succeeded, in the enactment of the present loitering law, in curing the defects in the old loitering law, it is certain that loitering laws have been a very fruitful subject of litigation.[113] We do not see how the deputy county attorney can be criticized because he disagreed with the police as to the use of this law.

Arrests characterized by the court as mass arrests. The arrests following the Paia incident and the first Lanai incident (Kaumalapau Wharf incident) were characterized by the court as "in mass" and as throwing a "very wide net" (R. 398, 406-407, 480). The Paia incident involved 200 or more men who massed together, when the mill whistle blew, to repel the police and employees seeking entrance to the mill, and the Kaumalapau Wharf incident involved well over 100 men rushing across the "kapu" line at Barbosa's signal to set upon the supervisory employees working on the wharf. The handling of incidents involving such large numbers presents grave problems. Of course the very reason for employing so many is to confuse, confound and intimidate.

The court did not find that innocent persons were arrested by officers who knew they were innocent. It found no lack of honor or personal integrity. The court did find, from the dismissal of sixteen persons from the complaint in Criminal No. 2419[114] out of a total of sixty-three

[113] See besides *Territory* v. *Anduha, supra, In re Bell,* 19 Cal. 2d 488, 122 P. 2d 22 (1942), and *Thornhill* v. *Alabama,* 310 U.S. 88.

[114] Four persons were dismissed at the opening of the preliminary hearing before the district magistrate and twelve at the conclusion of the preliminary hearing prior to the magistrate's decision (R. 145, 320; opinion, R. 406). The court remarks (R. 407) that Aki, one of the persons dismissed, was not a union man. But union men also

persons arrested for the Kaumalapau Wharf incident, that the police drew the defendants from a "very broad, indeed, the too broad field" (R. 480). This is tantamount to saying that the officers, confronted by the obstacles to identification of the guilty presented by violence perpetrated by large numbers of persons, should have made only a few arrests, and that the mistakes which occasioned the dismissal of these sixteen persons thereby would have been avoided. To move from this to a finding of an ulterior purpose to attack the labor movement is to assume the same mistakes would not have been made had the mass violence been committed by others. But such fact cannot be assumed. *Snowden* v. *Hughes,* supra, 321 U.S. 1.

The court erred (R. 481) in including in its consideration of "mass arrests" the incidents on the Island of Oahu, which were outside the County of Maui and concerned charges of obstructing the highway, not riot or conspiracy. (See *infra* under the heading "Incidents in the City and County of Honolulu".)

The court referred to the fact that in the case of the Kaumalapau Wharf incident pictures were taken before and after the incident as well as during it and all the pictures were used (R. 481, 406). This matter of the photographs means nothing without a case by case examination as to how the pictures were used, i.e., whether they stood alone as evidence and if so whether they were taken during the incident. The court did not undertake to do this. It recognized that it did not sit as a committing magistrate. No findings were made by the court as to the guilt or inno-

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were dismissed. The court also remarks that in the case of Aki a police officer expressed surprise at a non-union man being among the defendants. This police officer's comment is explained by the circumstances; the Kaumalapau Wharf incident obviously was a case of planned violence headed by union police and directed against supervisory employees endeavoring to load a barge during the pineapple strike.

cence of the persons before it. This is particularly important in connection with the summary which follows.

To summarize: These arrests involve serious questions which nevertheless belong in the territorial criminal court, not the federal equity court. The cases stand as follows. That criminal acts occurred which the court below does not condone; that all of the persons charged with those acts have come into court and made common cause claiming that, in the statutes invoked, there is no proper standard by which their accountability for those criminal acts may be judged; that they do not ask the equity court to find among them as to guilt or innocence, and when the government officers ask for particulars as to their vague claims of peaceful picketing so as to show as to each individual plaintiff what his claim is[115] this request is opposed and the court supports the plaintiffs in refusing to give particulars; that the court makes no findings as to guilt or innocence, and the court's theory is that the unlawfulness of plaintiffs' conduct is immaterial to the right to relief; that the court recognizes that ordinarily the criminal court would pass on the constitutionality of the statutory standard and the manner in which it applies but concludes that in these cases the territorial criminal court is not to be entrusted with this function. The reason why the federal court would not let the criminal court perform its normal functions was that the Supreme Court of Hawaii had held that the statute contained a constitutional standard for judging accountability for the criminal acts, the criminal court would apply that standard, and the trial court disagreed with the Supreme Court. The trial court thought that it could use a bill in equity to usurp the appellate jurisdiction of this Court. The cases then would have gone to the Supreme Court of the United States (where the appeal lay had the court been a statutory three-judge court as

[115] (R. 111; No. 12301, R. 55.)

it thought it was). But the Supreme Court of the United States has been insistent upon receiving questions such as this via the criminal courts where the state or territory's own construction of the statute has been adopted and can be tested in the light of its application, and a bill in equity cannot be used to usurp appellate jurisdiction (point III-B, supra).

The holding that excessive bail was required in many cases. The court reviewed the amount of bail set for those held for the grand jury. In the Kalua brothers incident this was $1,000 for each of the persons so held. The court also refers to the testimony of Pedro De la Cruz that for two of the eleven persons in the group arrested after the Kaumalapau Wharf incident bail was set at $1,000 apiece, for three of this group bail was set at $500, and for the remainder $250 apiece (R. 409-410, 481). The proceedings were on Lanai, while bail was set by Judge Wirtz[116] of the second circuit court, whose court is on the island of Maui (R. 96-97, 91). Hence, in order to hold a hearing on the amount of bail, the persons involved would have to be taken from the island of Lanai to the island of Maui by plane, which as the record shows they sought to avoid (R. 1300, 1301). By moving for reduction of bail they could obtain a hearing at a time convenient to themselves. The lower court seems not to have understood the situation.

Again the court makes a non-judicial approach to a legal issue. Excessive bail is contrary to the Eighth Amendment, but plaintiffs presented no issue under this amendment. If they had, the first question would have been as to the proper forum and the second would have been as to whether the bail was excessive within the meaning of the Eighth Amendment. Appellate courts have never condemned as excessive $1,000 bail; the federal trial court is more condemnatory in its review of the territorial circuit court, over

[116] See section 10735 of the Revised Laws of Hawaii 1945.

which it had no appellate jurisdiction, than an appellate court actually having powers of review would have been. In an address by the Honorable Leon R. Yankwich, United States District Judge of the southern district of California, 7 F.R.D. 271, Judge Yankwich says that the higher courts have declined to interfere in the amount of bail except in rare instances.[117]

On the factual side an interesting feature of this part of the case is Mr. De la Cruz's testimony that he borrowed from the businessmen on Lanai in order to raise bail (R. 1302). This is an example of what is wrong with the court's picture of the "mores" of the community. As above noted the court proceeded on the theory that the community presents a solid front against this union and all other labor organizations and has done so throughout its history. The island of Lanai, here involved, was described by the court as "entirely populated by employees of the company and their families" (R. 402), and therefore if the court were right in its assumptions, this island would present an extreme example of an employer-dominated community. Yet Mr. De la Cruz produced between $7,000 and $10,000 in cash from Lanai businessmen to use for bail for his men.

Incidents in the city and county of Honolulu. Plaintiffs were allowed to bring into record two criminal proceed-

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[117] Judge Yankwich cites for the proposition that the fixing of bail rests largely in the discretion of the judge admitting the person to bail, an opinion of this Court, *Connley* v. *United States,* 41 F. 2d 49. (See also 41 Yale L.J. 293, 296-297.) Speaking of the conscientious objectors cases, Judge Yankwich mentions that he did not reduce as excessive a bond of $1,000 fixed by the United States commissioner, for he did not consider this an abuse of discretion even though he himself, in an instance where a bond of $5,000 had been fixed in such a case, had fixed the bond at $500. Judge Yankwich characterizes as "normal" bail of $500 for each person prosecuted in the Jehovah's Witness cases, where of course acts of violence were not even involved.

ings in the city and county of Honolulu, involving incidents during the pineapple strike, i.e., the Sibolboro incident and the Turner's Switch incident. It was objected that the county attorney of Maui had no jurisdiction and that there was no offer to show that the attorney general directed the placing of charges as to these incidents (R. 1218-1220, 1566-1567). The court stated it entertained some doubt in the matter but that it would receive such evidence subject to a motion to strike (R. 1219), and the motion was denied in the opinion (R. 409, note 45).

Evidence should not have been received as to matters in other counties, for the reasons shown in Point V, *supra.* There was no concert of action among the different prosecutors of the several counties, and no offer to show that the attorney general acted in the matter. Actually the present attorney general was not even in office (R. 1731-1732).[118] Plaintiffs' testimony only showed, as might have been supposed, that these cases were handled by the police of the city and county of Honolulu and the public prosecutor of the city and county of Honolulu (R. 1221, 1222, 1565). These incidents did not even involve use of the unlawful assembly and riot act or the conspiracy statute, the charges being obstructing of a highway (Opinion, R. 409). The court made much of the large number of persons involved of whom only one was finally proceeded against, the other charges being nolle prossed (R. 481), but it was the public prosecutor of the city and county of Honolulu who nolle prossed these charges (R. 1565). Obstructing the highway[119] is a minor offense prosecuted in the district magis-

[118] It was shown that the only action taken by Attorney General Ackerman in the matter was to file an information, based on the Turner's Switch incident, for contempt of the temporary restraining order considered by the United States District Court in *Hall* v. *Hawaiian Pineapple Co., Hall* v. *California Packing Corp.,* 72 F. Supp. 533 (R. 1565, 1566, 1725-1730; Defendants' Exhibit O).

[119] Section 11103, R.L.H. 1945.

trate's court where there is a large volume of cases. As to the wide discretion commonly exercised by prosecutors in disposing of such cases, see 50 Harv. L.R. 583, 597.

Matters in the city and county of Honolulu being so irrelevant, and the court not having ruled on the relevancy thereof at the trial, the defendants confined their proof to a showing that the prosecutions were not for peaceful picketing. It was shown that in each incident there was obstruction of the highway and in the Turner's Switch incident there was also involved the use of physical violence (R. 1306 as to the Sibolboro incident, R. 1728-1729 as to the incident at Turner's Switch). Defendants produced a police officer who was a witness to both incidents and all plaintiffs' counsel cross-examined him on was whether there was a woman involved at Turner's Switch (R. 1730-1731).

Absence of prosecutions against others under the Unlawful Assembly and Riot Act. That laboring men who violate the criminal law are prosecuted under a more severe statute than non-laboring men, is the backbone of the court's "bad faith" concept. Hence this concept is essentially discrimination in the use of the statute. As shown in point V the court erred (R. 411-413, 481-482) in finding that during the life of the Territory no one has been prosecuted under the Unlawful Assembly and Riot Act anywhere in the Territory except in connection with labor disputes. The court could not reach the conclusion of "bad faith" from the fact that in Maui County during the last thirty years there was only one unlawful assembly and riot act prosecution prior to those during the sugar and pineapple strikes and said prior prosecution also arose out of a labor dispute, unless the following additional facts were present: similar incidents, involving non-laboring men, and use of a statute less severe than the Unlawful Assembly and Riot Act. Without these additional facts, the evidence does not

add up to discrimination. The additional facts cannot be found in the record. Hence, the court must have assumed them. Since, as we have shown in point V, such facts cannot be assumed but must be proved and there was no such proof, the discrimination necessary to the court's "bad faith" concept was not established.

Procurement of the second indictment in Criminal No. 2365. The court noted (R. 401) that there had been no remittitur by the Supreme Court to the circuit court in the *Kaholokula* case involved in No. 12301 before the matter was referred to the grand jury for the bringing in of the second indictment, the first indictment having been held by the Supreme Court fatally defective as to form. The court at R. 481 remarks on "the haste with which the prosecuting officers of Maui County procured the second indictment." The facts were, as shown in the Statement of the Case, *supra,* page 8, that the criminal cases involved in No. 12300 were to come before the grand jury at 9:00 a.m. on December 2, 1947, but on December 1, 1947, at 7:00 p.m. plaintiffs obtained an ex parte temporary restraining order to prevent the grand jury from proceeding. This order was not served on the county attorney until the very day of the grand jury session December 2, 1947 (R. 30). The grand jury, as shown in point XI, is convened from all parts of the county of Maui. The court seems to feel that in the haste of the moment it was the duty of the county attorney to anticipate that there was a second federal suit coming up, although only one had been filed and the parties in Criminal No. 2365 were the very parties who had litigated the constitutionality of the unlawful assembly and riot act in the Supreme Court.

This is another instance where the court did not directly deal with the issues. That the county prosecutor proceeded before the remittitur was sent down was a mere irregularity

(*In re Shibuya Jugiro,* 140 U.S. 291, 296). Therefore, the court should have treated the indictment as regularly returned and proceeded on that basis in its further consideration of the question of opportunity to challenge the grand jury by way of a plea to the indictment. This is considered in Point XI, where we show that the local practice allows such a plea.[120]

Further errors in the admission and consideration of evidence. We have discussed, *supra,* our objections to the receipt of the evidence concerning the Yamauchi incident and the incidents in the city and county of Honolulu. We also have shown our objections to the receipt of the testimony of the witness Hall, speculating as to a possible longshoremen's strike. The court further erred in receiving evidence of the witnesses Rania, De la Cruz and Kawano, concerning the effect of arrests on the union membership, since such testimony was argumentative and merely the conclusion of the witnesses. These objections constitute a portion of Specification of Errors 17 and the remainder will now be considered together with specification 16k.

Since the merits of the labor dispute were irrelevant (point VII, note 85 in the appendix, and *supra* this point), the court further erred in receiving evidence as to refusal of employers to arbitrate wage issues and in considering such matter in its opinion (R. 381). For the same reason it was error to consider the wages of sugar plantation laborers, and furthermore the court's handling of the facts

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[120] Although the first indictment in the Paia case is no longer involved, we take exception to the court's statement that "one man named as a defendant in the indictment" was dead at the time. The court says this man was Jose Pias (Opinion, R. 397, note 23). Exhibit 9 shows that the name of Jose Pias was struck by the grand jury foreman. (The name was not printed by the printer, R. 1240-1247.) At the trial it was called to the court's attention that the name was struck out and that the man was not indicted; the court at that time said the indictment would speak for itself (R. 1250).

was erroneous; since the figure of $1.84 in 1943 was merely a minimum wage, exclusive of bonus and perquisites (R. 1140-1147), and the figure of $8 at the time of the trial was the "approximate daily rate" (not minimum) inclusive of everything (R. 1159-1161), it is hardly fair to compare such unlike figures.

XI.

THE COURT ERRED IN ENTERTAINING THE GRAND JURY ISSUE, AND ERRED IN CONCLUDING THAT THE GRAND JURY WAS CONSTITUTED ILLEGALLY.

A.

In No. 12300, the grand jury issue is moot.

The complaint in No. 12300 sought to obtain a review (R. 11-19, 327-334) of the rulings of the Honorable A. M. Cristy sitting as a substitute judge in the second judicial circuit upon the motions and challenges to the 1947 grand jury made by the defendants in Criminal Nos. 2412 and 2413.[121] On December 1, 1947, after denial of these motions and challenges, said defendants, plaintiffs in No. 12300, brought suit below to restrain said grand jury from acting. At a hearing of December 10, 1947 in the court below, the deputy county attorney called to the court's attention that the challenged grand jury would be out of office in another month; there was considerable discussion concerning the unlikelihood that the case would be heard before the grand jury went out of office, so that if the temporary restraining order meanwhile prevented the grand jury from acting the grand jury challenge inevitably would be mooted (R. 1085-1096). The court nevertheless continued in effect the temporary restraining order (R. 100-103). The challenged grand jury did go out of office on

[121] It was stipulated that these challenges might be deemed to have been made also by the remaining individual plaintiffs, i.e., the defendants in Criminal No. 2419 (R. 339, par. 6).

January 12, 1948, without having acted, and when the case came on for hearing on April 23, 1948, the grand jury issue was moot.[122] The mootness was recognized by the court below as its decree is silent with respect to the composition of the grand jury (R. 543).

This is an example of the results of taking territorial criminal cases into the federal equity court. A considerable record was made on the challenges before Judge Cristy (R. 59-87, 567-1082) and if the defendants in the criminal cases wished to pursue the matter further this record should have been reviewed on appeal. The intervention of the federal equity court has made this impossible.

B.

In No. 12301, the court below erred in deciding that it could and should pass upon the composition of the Grand Jury.

Allegations of the complaint. Paragraphs X (No. 12301, R. 13) and XII (No. 12301, R. 16-19) of the complaint in No. 12301 alleged that the jury commissioners, in composing the 1947 Maui County Grand Jury, violated the following: (1) the Fifth, Sixth, Fourteenth and Nineteenth Amendments to the Constitution; (2) the Civil Rights Act; (3) section 83 of the Organic Act; and (4) sections 9791 and 9812, Revised Laws of Hawaii 1945. Plaintiffs alleged that the jury commissioners intentionally selected the grand jury list mainly from among the caucasian and employer groups and with regard to race, color and nativity, and intentionally excluded Filipinos and women.

After alleging the return, on December 2, 1947, of an indictment by said 1947 grand jury in Criminal No. 2365 against the individual plaintiffs (other than the class representative), the complaint alleged that said persons had been ordered to appear to plead to the indictment (No. 12301, R. 12-13) and further alleged that any attempt by

[122] Appendix, pp. 187-188.

plaintiffs to challenge the validity of the grand jury would be useless and futile (No. 12301, R. 22).

Motions and objections of defendants. From the inception of the case defendants not only attacked the jurisdiction of the court over the subject matter and the maintenance of a federal equity suit as a means of quashing pending criminal charges in the territorial court, but also specifically attacked the making of a collateral attack on the composition of the territorial grand jury in lieu of a challenge or plea in the criminal proceeding itself with appellate review thereafter (Return to Order to Show Cause, No. 12301, R. 39-42, parts I-IV; Motion to Dismiss and for Summary Judgment, No. 12301, R. 64-67, part VI; objections to admission of evidence concerning the grand jury, R. 1129-1132, renewed as going to entire line of testimony, R. 1370).

The opinion and the decree of the lower court. The court below decided (R. 495) that it had power under section 1343 of Revised Title 28[123] to decide whether plaintiffs had been deprived of rights guaranteed to them by the Constitution of the United States by reason of the methods employed in the selection of the 1947 Maui County Grand Jury, and that in any event it should determine the grand jury issue for the reason that it was a court of equity, it had acquired jurisdiction on adequate grounds, and the issue was a material one (R. 496). The lower court further concluded that the grand jury was constituted illegally (R. 508), holding that Filipinos had been deliberately excluded (R. 509) and that there had been a "deliberate substantial exclusion" of wage earners (R. 509) and a "deliberate substantial weighting" of the list in favor of "haoles" (R. 505) or the "employer-entrepreneur which includes the haole group" (R. 509). The court decreed that the indictment

[123] This section is set forth in note 15, appendix p. 165.

at Criminal No. 2365 was void, and should be held for naught (No. 12301, R. 96, paragraph XII).

A grand jury challenge cannot be initiated collaterally. The grand jury matter presents an attempt by the defendants under indictment in Criminal No. 2365 to challenge the composition of the territorial grand jury by a collateral proceeding in a federal equity court in lieu of proceeding in the territorial court, for no better reason than that they prefer to proceed in the federal court and are of the view that it would be futile to proceed in the territorial court. Not one of these persons has attacked the grand jury in the territorial court. If this Court affirms the decision below, it will be the first time that a grand jury challenge has been permitted to be initiated by a collateral proceeding in a federal court.

The pleadings and proof in No. 12301 reveal conclusively that only this single pending criminal prosecution is involved. The attack made by the complaint was directed to the 1947 grand jury which had returned the challenged indictment but was about to go out of office when suit was brought below and did go out of office long before the hearing below. Even the lower court did not believe it had power to remove the jury commissioners (R. 512) and the complaint neither sought such relief nor made any allegations concerning the 1948 or other grand juries.

The contentions previously presented may render it unnecessary to go into the further matter here presented, i.e., that a grand jury challenge cannot be initiated collaterally. To summarize the contentions previously presented as they apply to the grand jury matter: The ILWU and the class representative have no interest, cognizable as such, in the 1947 grand jury challenge.[124] The individual plain-

[124] Neither was a "person held to answer a charge for a criminal offense" (section 9812, Revised Laws of Hawaii 1945, appendix VII). The filing of suit in federal court did not give either the ILWU or

tiffs did not establish jurisdictional amount and are dependent upon the applicability of paragraph (14) of former section 24 of the judicial code, 28 U.S.C. 41 (14), now section 1343 (set forth in note 15, appendix p. 165). But former section 265 of the judicial code, 28 U.S.C. 379, now section 2283 (set forth in note 19, appendix p. 166) also applies and prohibits the federal equity court from enjoining the pending criminal proceeding (points I and VI-B, *supra*). The Civil Rights Act, 8 U.S.C. 43, made no exception to this prohibitory statute (point VI-C). To the contrary Congress provided a removal statute for the protection of equal civil rights; the removal statute often has been invoked in order to attack the composition of a state grand jury, but the Supreme Court has narrowly limited the removal statute to instances of inequality in the laws, and has insisted that attacks upon the administration of the laws proceed in the state courts (point VI-C; *Murray* v. *Louisiana,* 163 U.S. 101, 105, 106; *Gibson* v. *Mississippi,* 162 U.S. 565, 582; *Neal* v. *Delaware,* 103 U.S. 370, 386, 387; *Virginia* v. *Rives,* 100 U.S. 313, 321). The Supreme Court in the same way has narrowly limited the power of habeas corpus, the other power which a federal court possesses for intervening in pending state criminal cases (point VI-C). A federal equity court has no jurisdiction to intervene in pending state criminal cases, equitable relief being ancillary to the power of removal and not a separate ground of jurisdiction (point VI-A, also VI-C). For these reasons the federal equity court had no power to intervene in the pending criminal case and pass upon the composition of the

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Rania an interest which it or he did not have prior to the filing. By virtue of the case or controversy rule, federal courts do not render advisory opinions. *United Public Workers* v. *Mitchell,* 330 U.S. 75, 89; *Alabama* v. *Arizona,* 291 U.S. 286, 291; *United States* v. *Evans,* 213 U.S. 297, 300, 301. A, against whom no charge is filed, cannot complain that a grand jury which indicts B is not composed lawfully. *Gusman* v. *Marrero,* 180 U.S. 81, is an excellent illustration of this point.

grand jury which returned the indictment, but even if it believed an equity bill gave it all the jurisdiction which it would have under a petition for habeas corpus, the court should have heeded the admonitions of the Supreme Court that state court remedies first must be exhausted, and should not have exercised such jurisdiction (points VI-C and IX).

The foregoing principles are so basic that we have not been able to uncover a single other case wherein a state court defendant tried to challenge the composition of a state grand jury in an 8 U.S.C. section 43 cause of action filed in a federal equity court.[125]

Proceeding now to the further proposition that a grand jury challenge cannot be initiated collaterally, and that this case presents an attempt to do so for no better reason than that the defendants in Criminal No. 2365 prefer to proceed in the federal court and are of the view that it would be futile to proceed in the territorial court, we first consider the opportunity of the defendants in Criminal No. 2365 to present in the circuit court for the second judicial circuit of the Territory of Hawaii the question whether the 1947 grand jury was constituted legally.

Did these persons have an opportunity to challenge the grand jury prior to December 2, 1947? The court below held that they did not (R. 491-492) and we do not contest this part of the lower court's conclusion, although we disagree with the reasons given therefor by the court. But the controlling question is whether the defendants in indictment No. 2365 could have challenged the grand jury

[125] See 24 Am. Jur. Grand Jury, section 30, page 854; 38 C.J.S., Grand Juries, section 25, page 1014; 52 A.L.R., page 919. It is noteworthy that: (1) the annotation in 52 A.L.R. 919, which sets forth the remedies for exclusion of an eligible class from a grand jury, does not mention an action under 8 U.S.C., section 43; and (2) the author of the comprehensive article on race discrimination in jury service, in 19 B.U.L.R. 413, does not even suggest such a remedy (despite an evident dislike for the present state of the law).

subsequent to December 2, 1947, when the indictment was returned.

Could these persons have challenged the grand jury subsequent to December 2, 1947, in the event they wanted to do so? The lower court (R. 492) indicated that, after the first retirement by the newly impaneled grand jury, the composition of the grand jury may not be attacked.[126] This is *not* the law of the Territory of Hawaii. *Territory* v. *Braly,* 29 Haw. 7, shows that the composition of the grand jury may be challenged by plea in abatement or by motion to quash the indictment or by demurrer to the indictment. *Kaizo* v. *Henry,* 211 U.S. 146 (1905), reveals that in the Territory of Hawaii the practice of attacking the composition of a grand jury by plea in abatement is of long standing. The federal court was obliged to accept as the local practice what the local courts have established it to be (see point III-B, *supra*). That the territorial statutes do not provide for the foregoing ways of attacking a grand jury is immaterial, for the practice is well established. The Supreme Court of the United States confronted with similar circumstances, has held that "When the defendant has had no opportunity to challenge the grand jury which found the indictment against him, the objection to the constitution of the grand jury upon this ground may be taken, either by plea in abatement or by motion to quash the indictment, before pleading in bar." *Carter* v. *Texas,* 177 U.S. 442, 447.[127]

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[126] The court said that individual grand jurors could still be challenged, but that was all.

[127] On the same page, the Supreme Court also stated that it had the right to determine for itself whether the federal question was properly presented in the state court and hence could be considered by it on appeal. Apparently it was this statement which persuaded the court below to the following language "But this raises a substantial federal question which, however, melts into the major contentions of the plaintiffs in the instant cases that they have been

Since these persons could have challenged the grand jury subsequent to December 2, 1947, is the possibility that such challenge would not have been successful a valid excuse for not trying it? In paragraph XVII of the complaint in No. 12301 (No. 12301, R. 22), plaintiffs allege that an attempt to challenge the validity of the composition of the 1947 Maui County Grand Jury on the grounds set forth in the complaint would have been useless and futile. Plaintiffs allege as reasons for such conclusion that: (1) the evidence and ruling would have been the same as the evidence and ruling in the hearing before Judge Cristy in Criminal Nos. 2412 and 2413; and (2) the order of court would have been the same as the order of court made by Judge Cristy (i.e., the challenge to the validity of the grand jury would have been denied). These allegations sound like a plea of "extenuating circumstances," made in an effort to justify the collateral attack on the grand jury through the medium of an action in federal court. Not only is this assumed futility factually unsound,[128] but moreover it is not the law that an opportunity to preserve constitutional rights may be neglected because deemed futile. Thus, in *McLeod* v. *Majors,* 102 F. 2d 128 (C.A. 5th), the petitioner contended in federal court that resort to the appellate courts of the state would have been useless because, in a prior case which did not involve the petitioner, the highest court of the state had decided adversely to the position which the petitioner

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denied their constitutional rights" (R. 493). This language is meaningless, but, if intended to state that the grounds for challenging the grand jury raise a substantial federal question and therefore the *district court* may consider the question, of course it assumes the very point in issue as to the right to make a collateral attack on a grand jury.

[128] It is reached only by indulging in a series of assumptions, i.e., an exact similarity to Criminal Nos. 2412 and 2413 in (1) issues, (2) evidence, (3) rulings on evidence, and (4) order of court; plus (5) affirmance by the Supreme Court of the Territory which had made no ruling in Criminal Nos. 2412 and 2413.

would have had to take on appeal. At page 129, the Circuit Court of Appeals said, "We do not consider this constituted exceptional circumstances warranting the release of Majors on habeas corpus." Similarly in *Mason* v. *Smith,* 162 F. 2d 336, 337 (C.A. 9th), this Court held against a contention that state court appeal was impossible because petitioner could not serve and file the notice of appeal in time, the court saying: "He should have made the effort and he must still make the effort * * *."

That a person indicted by an allegedly illegal grand jury must, if he would avoid being tried on the indictment, avail himself of his opportunity to challenge the grand jury in the criminal court by producing sufficient evidence at the proper time, and that if he does not do so, and is convicted, the conviction is *not void* but valid, is a point well established. *Andrews* v. *Swartz,* 156 U.S. 272, 276; *Kaizo* v. *Henry,* 211 U.S. 146, 148; *Hale* v. *Crawford,* 65 F. 2d 739, 745 (C.A. 1st), cert. denied 290 U.S. 674. Since the indictment is not void, the issue does not lie collaterally. Invoking of the Civil Rights Act cannot change this basic principle.

The court below (R. 495) assumed that, even if the grand jury issue was not a cause of action capable of standing on its own feet, nonetheless the court could hear and decide the issue along with the cause of action concerning the validity of the statutes. The court evidently had in mind the rule with respect to the joinder of federal and local grounds in a single cause of action (see *Hurn* v. *Oursler,* 289 U.S. 238, 246). But this rule never has been held to work a change in the nature of the issues so joined. Hence, if an indictment is not absolutely void because of the composition of the grand jury, joinder of the attack on the grand jury with something else cannot change the nature of the issue or make it lie collaterally. *Only removal of the case* into the

federal court could make the grand jury issue lie there, since it then would not be collateral. The court below really treated the case[129] as if it had been removed into the federal court, although it denied this (R. 495-496), conceding that it was not removable (R. 494-495).

To summarize, a person indicted by a grand jury which he believes to be constituted illegally, may not refuse to challenge the composition of the grand jury in the criminal prosecution and instead challenge its composition via a bill in equity, for two reasons: (1) equity cannot enjoin pending criminal proceedings; and (2) the organization of the grand jury may not be attacked collaterally. Where such a bill in equity is presented in the federal court, the exhaustion of state remedies rule is an additional reason for not entertaining the bill.

C.

The Court below erred in concluding that the grand jury was constituted illegally.

The Fifth Amendment, which is applicable in the Territory of Hawaii, guarantees to persons accused of crime the right to insist that the grand jury which indicted them shall have been duly constituted. At the outset, the concept (or requirement) of the jury as a cross-section of the com-

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[129] For example, the court would have entertained challenges to individual grand jurors for bias and prejudice if it had thought there was enough in the record to develop the matter (R. 512). But even the expansive ideas of the plaintiffs did not extend that far; they pleaded no such issues (see complaint, No. 12301, R. 4-26, and see defendants' objections to the grand jury line of testimony (R. 1131-1132). In fairness to Judge Cristy it must be said that the lower court's criticism (R. 499) of the scope allowed for the examination of the individual grand jurors in the Maui proceeding is not supported by the record of that proceeding. (See R. 949, "The Court [Judge Cristy]: The exception will be noted. You may proceed, Mr. Resner, along the line that you stated to the court you wanted information.", and compare R. 936-937 with the examination of the grand jurors, which begins at R. 950.)

munity must be discussed, both because it relates generally to all the alleged violations of due process and because a preliminary discussion of it will serve to clarify thought concerning a somewhat confused subject. In one form of words or another, the concept is referred to in the following Supreme Court cases: *Smith* v. *Texas,* 311 U.S. 128, 130; *Glasser* v. *U. S.,* 315 U.S. 60, 85; *Thiel* v. *Southern Pacific Co.,* 328 U.S. 217, 220; and *Ballard* v. *U. S.,* 329 U.S. 187, 192, 193. A careful examination of these cases reveals that the Supreme Court has attempted to point out how to fulfill the requirement only by specifying how it is not fulfilled. That is, the Court has not set forth any directions as to the method of operation by which jury selectors may be certain of fulfilling the requirement; instead, it has specified certain practices which, if followed by the jury selectors, will result in the composition of a jury which does not meet the requirement. Thus, for example, the Court has proscribed the intentional and systematic exclusion of: (1) Negroes (*Smith* v. *Texas, supra*); (2) daily wage earners (*Thiel* v. *Southern Pacific Co., supra*); (3) women, under certain circumstances (*Ballard* v. *U. S., supra*). It must be kept clearly in mind that the Court has not put a ban on any practice other than intentional and systematic exclusion.[130]

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[130] At R. 511 the lower court stated "The constitutional guarantee requires that no group in the community shall be excluded deliberately from jury service and that a grand jury panel shall constitute a fair cross-section of the country or locality from which it is drawn." If it meant thereby to indicate that there were two separate and distinct requirements, the court below misunderstood the applicable language of the Supreme Court of the United States. In the *Ballard case, supra,* 192-193, the Supreme Court quoted with approval the following language from the *Thiel case, supra*: "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. . . . This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and

Before examining whether what the jury commissioners did was wrong, it is first necessary to find out what they did. The jury commission consisted of the Honorable Cable A. Wirtz, Circuit Judge of the Second Judicial Circuit, and two persons selected by him; C. E. Chatterton, a Republican and a Maui County resident for 30 years, and Augustine Pombo, a Democrat who lived on Maui all his life (R. 703). The commissioners met more than eleven times, beginning in June, 1946 (R. 703). In the nineteen precincts farthest from the court house, they selected persons both for the grand jury list and the trial jury list on the basis of the information in the answers to the questionnaires[131] which they had sent out to the 1944 registered voters (R. 703).[132] In the other fourteen precincts, they selected such persons from the 1944 registered voters on the basis of information

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geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups." This indicates that an "impartial jury drawn from a cross-section of the community" (the lower court's second requirement) is an American tradition or ideal, and that the prohibition of "systematic and intentional exclusion" (the lower court's first requirement) is a statement of that tradition in the terms of a practical rule for the guidance of those who select juries.

[131] The commissioners planned to send questionnaires to registered voters in all 33 precincts but decided to cover the outlying precincts, particularly the island of Lanai, first (R. 704-705).

[132] The lower court was of the opinion that "the questionnaires seem to have been employed for no purpose within the law in so far as the 1947 grand jury was concerned" (R. 508). The court failed to state that precisely the same questionnaire was used by the District Court of the United States for the District of Hawaii (R. 1830, as reprinted; this however was not a part of any exhibit but is submitted to this Court as a matter of practice in the Court below of which this Court may take notice). The court also rejected, without any statement of its reason therefor, the rational explanation that the particular questions (which the court seemed to believe had a bad purpose) were useful to trial attorneys in questioning petit jurors on voir dire (R. 759) (the commissioners also selected one hundred petit jurors, using the same questionnaires).

in the answers to old questionnaires, personal knowledge of a prospective grand juror, knowledge of his reputation in the community, or observation of him from past jury service (R. 705-706, 712-713). They had no arbitrary standards with respect to race, color, occupation or education (R. 789-791, 848). Their plan was to have on the grand jury list one or more jurors from each precinct, based upon the ratio of the registered vote in a particular precinct to the whole registered vote (R. 704).[133] The plan operated as follows: Suppose precinct No. 1 was allocated two grand jurors. When the commissioners went down the list of prospective grand jurors in precinct No. 1 and found two persons of whose qualifications they were reasonably well assured, they did not continue on down the list (R. 915). All the commissioners agreed on each selection (R. 704).

The alleged intentional exclusion of Filipinos. The basic United States statute with respect to racial discrimination in connection with jury service is now Revised 18 U.S.C., section 243 (formerly 8 U.S.C. section 44).[134] Although it speaks of race, color or previous condition of servitude, it was passed shortly after the Civil War (in 1875) to protect the newly-freed blacks. Thus, it is not surprising that almost all of the racial discrimination cases which we have found involved the alleged discrimination against blacks. Moreover, these cases arose in communities where nearly everyone was either white or black, and the blacks comprised a substantial proportion of the population. How-

[133] Although the commissioners did most of their work before the 1946 registry of voters was compiled and hence used the 1944 registry (R. 762), the court below considered the 1946 list (R. 502), which was not, for practical purposes, available to the jury commissioners.

[134] Section 83 of the Hawaiian Organic Act, 48 U.S.C., Section 635, also places jury commissioners in the Territory of Hawaii under the duty to constitute a grand jury without reference to race or place of nativity.

ever, the Territory of Hawaii, melting pot that it is, contains persons who may be classed ethnologically as Caucasian, Mongolian, Polynesian, Malayan and Negro (or practically any combination thereof).[135] Furthermore, a Mongolian may be a Chinese, a Japanese or Korean, and a Polynesian may be a Hawaiian or a South-Sea Islander (Samoan, Tahitian, etc.). Under such circumstances, what is a "race" in the Territory of Hawaii for the purpose of racial discrimination in the composition of a grand jury? Must jury commissioners also be ethnologists? Is will be observed that no Korean, Hawaiian, Porto Rican or Filipino was on the 1947 Maui County Grand Jury list (R. 501) but there were Chinese, Japanese, and many persons of more than one racial stock (R. 1432-1436).[136] Is the absence of Koreans, etc., evidence of racial discrimination? The foregoing discussion is intended only to spotlight the fact that alleged racial discrimination in the southern states is a vastly different problem from alleged racial discrimination in the Territory of Hawaii.

Assuming for discussion but not conceding that Filipinos are a "race" as to whom there may be presented a contention of alleged racial discrimination in the composition of a grand jury in the Territory of Hawaii, the first problem concerns the facts which a plaintiff having the right to assert the claim,[137] must prove in order to justify

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[135] See Inter-racial Marriage in Hawaii, Romanzo Adams, Macmillan Company 1937, pages 18, 19.

[136] Plaintiffs concede that there were 7 Japanese, 4 Chinese, and 12 part-Hawaiians, or 23 non-caucasians (R. 1942-1943). They class the remainder as 27 caucasians, including 21 "haoles" and 6 Portuguese. As to use of the term "haole" see footnote 141 infra.

[137] In Fourteenth Amendment cases of racial discrimination a member of the excluded class is not required to prove prejudice, as Congress has forbidden such discrimination, so that a grand jury set up in defiance of its command is an unlawful one whether the Supreme Court thinks it unfair or not (*Fay* v. *New York,* 332 U.S. 261, 293). In all Fourteenth Amendment cases, the Supreme Court

a court in concluding that discriminatory exclusion existed. Such a plaintiff has the burden of proof. This was recognized by counsel for the plaintiffs and by the court (R. 1453). In the terms of the present case, this means that plaintiffs had the burden of proving that Filipinos were excluded because of their race (*Akins* v. *Texas,* 325 U.S. 398, 400). Proof that no Filipino was on the 1947 grand jury is not enough. There must be a clear showing that the absence of Filipinos was caused by discrimination (i.e., intentional and purposeful exclusion). Discrimination may be admitted by the jury selectors or proved by long-continued unexplained exclusion of eligible Filipinos (*Neal* v. *Delaware,* 103 U.S. 370, 397; *Norris* v. *Alabama,* 294 U.S. 587, 591; *Pierre* v. *Louisiana,* 306 U.S. 354, 361; and *Patton* v. *Mississippi,* 332 U.S. 463, 466).

The next step in logical sequence is to examine what plaintiffs proved and what the lower court thought they proved. In this connection it must be borne in mind that the application, not the validity, of the territorial statutes has been attacked. Territorial laws applicable to the selection of grand jurors provide that the jury commissioners in each circuit shall, after careful investigation, select each year fifty persons who are citizens, males, over 21, residents of the circuit, in possession of their natural faculties and not decrepit, intelligent and of good character, and who

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"has never entertained a defendant's objections to exclusions from the jury except when he was a member of the excluded class" and has not decided the question "whether lack of identity with an excluded group would alone defeat an otherwise well-established case under the Amendment" (*Fay* v. *New York, supra,* 287). These questions of prejudice and membership in the excluded class have been expressly left open in the cases concerning federal juries, which have been decided on the basis of the Supreme Court's power of supervision over the administration of justice in the federal courts (*Thiel* v. *Southern Pacific Co.,* 328 U.S. 217, 225). It is to be noted that the cases concerning federal grand juries were not decided under the Fifth Amendment's requirement of presentment by a grand jury.

can understandingly speak, read and write the English language (Sections 9791 and 9800, Revised Laws of Hawaii 1945, appendix VI). *Note that the statutes do not provide that the commissioners shall determine and list every person who is eligible and then the list of fifty shall be drawn by lot from those who are eligible.* To the contrary these statutes, like the Texas statutes involved in *Akins* v. *Texas, supra,* authorize the jury commissioners to exercise a wide range of choice. The constitutionality of conferring such a power of selection has been sustained, and, as above noted, is not under attack here. See *Akins* v. *Texas, supra.*

One way of establishing racial discrimination is by admissions of one or more of the jury selectors. In this case, not one of the three jury commissioners appeared as a witness before the lower court. Each had testified in the proceedings before Judge Cristy (i.e., in the challenges made at Criminal Nos. 2412 and 2413). Their testimony was stipulated into the record in this case, although objections to relevancy were not waived (No. 12301, R. 83-84, paragraph 9; R. 1129-1132). Thus, the court below had no chance to make the many observations concerning a witness which are based on seeing him on the stand and hearing him testify. So far as the jury commissioners are concerned, all the lower court had before it was about 200 pages of testimony (see R. 701-728; 737-793; 803-811; 825-884; and 885-936). Out of these 200 pages, the court found, in a nine-word statement of Commissioner Pombo, what seemed to it to be conclusive proof of deliberate exclusion of Filipinos (R. 505). When Pombo was asked for his "best answer" concerning the absence of Filipinos, he replied "We just have a lot of other men a lot better" (R. 850). The lower court evidently construed this answer as an admission that the jury commissioners excluded Filipinos *because they were Filipinos* (i.e., on the basis of race

or color or place of nativity). Possibly the fact that the court below did not see and hear Commissioner Pombo explains its complete misconstruction of this answer. For the information of this Court, the line of questions culminating in this answer is set forth in a footnote.[138] From

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[138] Q. Now this questionnaire was returned on October 8th, 1946, two months before the work was completed. You see October 8th, 1946? A. Yes. Q. Returned it before October 8th, 1946. This gentleman filled it out on the 28th of September, 1946, and this shows that a voter by the name of Joseph Dias Barona, who was born at Hilo, Hawaii, on October 8th, 1918, was 27 years old, and has been in the Territory all of his life, and is married and is a Filipino by origin—at least his father and mother are—and that he is employed as a chauffeur at the Naval Air Station and that his occupation was laborer and truck driver, and he was a student at St. Anthony's School and finished the 9th grade—did you investigate that man for Grand Jury service—duty? A. We probably did. We have had others a whole lot better than he was. Q. Others of Filipino nationality? A. No. Mr. Resner, I would like to—we going through a lot of trouble in going out picking nationalities. I can cut that off short. I don't pick a man by his nationality. I pick a man on his merits. If I going over the questionnaires, if I think he is a good man, regardless of whether he is Japanese, Portuguese or haole, I ask the rest of the Jury Commission to include him in the list. Q. How do you explain the fact that there has never been a Filipino serving as a grand juror on Maui? A. We haven't come to it. Q. Why not? A. He is just as well a citizen as anybody else—I don't consider him a Filipino either—we just haven't. Only 50 in the Grand Jury out of how many voters in 1945. Pretty hard to put them all on the Grand Jury. Q. Yes, but why is it that with a substantial portion of the labor force of Maui Filipino—and of course you recognize that the Grand Jury is supposed to be a cross-section and representative of the community? A. Well, it is. Q. It is supposed to represent all the groups in the community. A. It is. Q. And a large group of the community is Filipino. A. I don't consider that. I don't draw the color line. You are a haole, you might do it—I don't. Q. I am just trying to get the record straight. A. I pick a man on his merits. If he is a Hawaiian, Portuguese or Japanese—don't make any difference to me. Q. Try to answer the question, Mr. Pombo. A. We just didn't come to him. Q. A substantial portion of the population of Maui is Filipino, isn't it? A. Might be, I am not sure. Q. There isn't any question in your mind about it? A. I haven't looked at it. I can't give you any figures. Maybe. Q. Suppose in a few minutes I show you the figures from the United States Census. A. If you can show me the figures. Q. But you do concede, of course, that a substantial portion of the

the whole of Commissioner Pombo's testimony at this point, it becomes obvious that he was simply saying in his own language that he selected the persons who were in his judgment the best qualified with respect to the statutory qualifications for jurors. He expressly stated "I pick a man on his merits." Hence the word "better" in the nine words selected by the court, by prior definition of the witness had no racial significance.

Having in mind that the selection of jurors is a group, not an individual, decision, the lower court's reliance on Commissioner Pombo's statement is subject to the further criticism that it completely ignores the testimony of the other two jury commissioners. Both Judge Wirtz (R. 758) and Commissioner Chatterton (R. 926) testified in substance that no person was excluded on the basis of race or color or place of nativity. Moreover, of the fourteen Filipinos whose questionnaires were discussed in the cases before Judge Cristy, at least three were considered by the commissioners to be qualified (R. 857). On this point the strongest case plaintiffs could make was that the commissioners marked some questionnaires "questionable" where plaintiffs thought they should have been marked "qualified" (R. 1451). All this means is that if plaintiffs were the jury commissioners they would have exercised their judgment differently. Like the plaintiffs, the court below also wanted to act as the jury commission. It named three Filipinos as qualified for grand jury service (R. 502, footnote 94) [139] despite the fact that this was not the function of the court.

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labor force is Filipino? A. I wouldn't doubt that—I guess they are. I wouldn't know. I haven't seen any figures. Q. I want you to give me your best answer as to why there has never been a Filipino on the Grand Jury? A. We just have a lot of other men a lot better (R. 848-850).

[139] These were not the same three who were classified by the jury commissioners as qualified.

Another way of establishing racial discrimination is by proving long-continued exclusion of eligible members of the particular race. Along this line plaintiffs brought out from the witness Crockett, since 1919 and still at the time of the trial Deputy County Attorney for Maui County, that he did not believe there had been a Filipino on a Maui grand jury prior to the grand jury under attack (R. 1559). In the Maui proceedings plaintiffs brought out from the witness Pombo, a Maui County Jury Commissioner from 1934 to 1947 with the exception of 1945, that no Filipino had been on a Maui grand jury or grand jury list during that period of time (R. 843). In summing up, counsel for plaintiffs used a chart (not admitted in evidence) which set forth that in 1947 there were 10,509 Filipinos in Maui County, representing 18.8% of the population of the county (R. 1942), although the witness Reinecke testified that this was the 1940 figure (R. 1444-1445). Without analysis, this looks like strong proof of the *Patton* v. *Mississippi* type. However, it is highly deceptive, for it fails to consider the question of the eligibility of Filipinos. To use an extreme example, suppose that there had not been a single Filipino in Maui County prior to 1939 (and a fortiori no eligible Filipino). Under such circumstances, a statement by a witness that there had not been a Filipino on the grand jury during the period from 1919 to 1947 would form the basis of a most erroneous inference (i.e., exclusion for nearly 30 years). Again, one might reason that if there was a large group of Filipinos in Maui County for nearly 30 years, there must have been some eligible Filipinos each year during that period, and that if there was no Filipino on the grand jury during that period, discrimination must have existed. However, eligibility requires, among other things, citizenship and the ability to read, write and speak English with understanding. That such eligibility cannot be

so assumed and that mere population figures are as misleading as none at all, now will be shown.

So far as eligibility is concerned, Filipinos must be distinguished from Negroes; since the Civil War almost all adult male Negroes have been citizens, whereas very few adult male Filipinos have been citizens. Plaintiffs' Exhibit No. 22 is most revealing; this is a tabulation of the Filipino voters registered in Maui County for the election years from 1934 to 1946, and shows 103 male voters in 1946, 63 in 1944 and only 9 in 1934 (R. 1450). This very low number of male voters is due to the fact that until 1946 Filipinos who had not been engaged in the military service of the United States could not become naturalized citizens (8 U.S.C., Sections 703, 724). It should be observed that every Filipino whose grand jury questionnaire was put in evidence (R. 1498-1515) was of the second generation in the Territory, indicating that they were citizens by virtue of birth; their ages indicate that they became eligible only within the past few years. That the native born are just beginning to come of age is further confirmed by Plaintiffs' Exhibit 27, a census of Filipinos and others employed by sugar companies on Maui on June 30, 1947 (R. 1572). This shows 1339 citizens out of 3771 Filipinos, but, of the 1339 citizens, 1153 are children, 80 are women, and only 106 of the total number of Filipino citizens are male adults. This is characteristic of a very recent immigrant group.

It thus appears that with respect to the period from 1919 (at which time Mr. Crockett's testimony begins) to 1947 (the year of the grand jury in question) plaintiffs did not introduce any evidence showing the number of adult male Filipinos who were citizens, other than the extremely small showing made from recent lists of registered voters, and it further appears that, because of the surrounding circumstances, citizenship over a period of years cannot be assumed. For the same reason, namely that this is a recent

immigrant group, ability to speak, read and write English understandingly, which is required for eligibility, cannot be assumed.[140] In addition plaintiffs did not offer an iota of evidence as to whether any Filipino had served on a petit jury in Maui County. So, when plaintiffs' evidence on continual exclusion of Filipinos is set in its proper background, its extreme weakness becomes apparent. Compared with the proof in cases such as *Norris* v. *Alabama* and *Patton* v. *Mississippi* (supra), it falls short of even a prima facie case.

This is not surprising, as the idea of making the exclusion of Filipinos a main basis of attack on the grand jury is definitely an afterthought on the part of the plaintiffs. In the cases heard before Judge Cristy the racial discrimination issue was caucasian versus non-caucasian, and the question of Filipino exclusion was merely incidental to the alleged selection mainly of caucasians, as appears from the challenges (Exhibit E, III, 4; R. 73-75), the then defendants' opening statement (R. 570), the emphasis of their exhibits (R. 1425, 1535, 1537) and their failure to produce proof such as citizenship and literacy statistics. In fact, Filipino exclusion was not mentioned in the examination of Judge Wirtz but was first mentioned on examination of the witness Pombo (R. 843). In No. 12301, Filipino exclusion was pleaded (No. 12301, R. 18), but plaintiffs made little effort to bolster their weak case. The witness Crockett was asked a few questions concerning it (R. 1559) and, as mentioned before, in their summary counsel for plaintiffs used an unadmitted chart concerning the estimated number of Filipinos in Maui County in 1947, actually based on 1940 figures.

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[140] For example, plaintiffs selected 12 questionnaires of Filipinos to put in evidence (R. 1498-1515). One of these, Narcisso Sipe, was a witness in the court below, and plaintiffs' counsel suggested an interpreter for him (R. 1334). In this connection note that on his questionnaire Sipe stated that he had reached the 7th grade in school (R. 1500).

The alleged "weighting" of the grand jury list in favor of "businessmen." Another denial of due process alleged by plaintiffs is that the jury commissioners intentionally selected the grand jury list mainly from the employer group. The lower court concluded that there was a deliberate substantial exclusion of wage earners and a deliberate substantial weighting of the grand jury list in favor of "businessmen" (the employer-entrepreneur group which includes the haole group in Maui County, according to the court) (R. 509). Stripped of its gloss of verbiage this means that in the opinion of the lower court there were on the grand jury list too few laborers and too many businessmen or haoles (the lower court gives the term "haole" both racial and occupational and social connotations) [141] with relation to the number of laborers and businessmen in Maui County. This is the theory of proportional representation which has never been approved (Infra, pp. 157-158). We first will consider the groups which the court below thought were disproportionately represented in this case.

As appears from the opinion (R. 499-501), the lower court arbitrarily divided Maui County into two rigid, mutually exclusive and opposing groups.[142] One group was designated the "employer-entrepreneur" group (R. 499,

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[141] While the word "haole" was given variant meanings by the Court, the use of the word adds nothing to the findings. If the word "haole" was used to describe part of the caucasian race in contra-distinction to another part of the caucasian race (e.g., Portuguese, see R. 1379) it is irrelevant, for the Court found no discrimination against Portuguese and plaintiffs' own chart prepared for argument (R. 1943) shows six Portuguese on the grand jury list, more than their population ratio. If the word "haole" was used to describe persons of economic and social attainment, it adds nothing to the term "employer-entrepreneur" used by the Court, hence is equally irrelevant.

[142] The basic error in this breakdown (or any other breakdown of this type) is the underlying assumption that a community may be stratified, according to occupation, into groups wherein each person in the group will possess the same viewpoint and mental attitude toward life as all other persons in the group, regardless of race, personal background, religion or education.

500). From the 84% figure used by the court, this group must have been made up of the following classes (according to plaintiffs' definition of classes): professional and semi-professional workers; farmers and farm managers; proprietors, managers and officials, except farm; clerical, sales and kindred workers; and craftsmen, foremen and kindred workers (R. 1538). This arbitrary classification places in the employer-entrepreneur group such persons as a navy freight clerk (R. 1432), a U. S. engineers foreman (R. 1434), a territorial forester (R. 1434), and research workers (R. 1434, 1435). ILWU members Ito (R. 729), Saka (R. 731) and Muroki (R. 1037) must have been placed in the court's employer-entrepreneur group, inasmuch as they are not among the persons designated by plaintiffs as daily wage earners (R. 1349) and not among the persons whose group occupation was not reported (R. 1538). Any grouping which classes union men in the employer-entrepreneur group is obviously artificial. Moreover, the entrepreneur group was not coincidental with the haole group, the court simply having assumed such against its own findings.

The other group was designated the "laboring men" (R. 501). As above noted this group did not include three union men, but it did include three other union men.[143] Altogether, it included six laboring men on the grand jury list, Messrs. Alu, Cornwall, Correia, Rezents, Iziku and Ayers (R. 1439). This list of six conforms with the court's figures (R. 501).

The court then compared the percentage of laborers on the grand jury and the percentage of laborers (male) in Maui County (R. 501). This is a highly inaccurate comparison, because it compares persons of known eligibility with persons of unknown eligibility. That is, it fails

[143] These were Rezents (R. 734), Correia (R. 736), and Alu (R. 1036), all members of the ILWU.

to consider the percentage of male laborers in Maui County who were eligible for jury service. For example, see plaintiffs' Exhibit No. 27 (R. 1572), which shows that, of the 2072 male Filipinos in that particular census, 1966 were not citizens.

In order to follow this new and nebulous rule which the lower court announced, the jury commissioners must predict the cases which will come before the grand jury, for obviously the groups here used were custom tailored to fit the present cases. Such an over-simplified artificial grouping, based on only one common characteristic, i.e., occupation, would not serve in other cases (for example a politician or a religionist might be the defendant). Moreover, the jury commissioners must be statisticians to work this plan of occupational proportionate representation in with their own plan of geographical representation (i.e., proportional representation of the different precincts). The plain result of the lower court's rule is to drive the jury commissioners into picking the list by lot. But, picking the list by lot is not the law. A statute providing for a right of *selection* is not unconstitutional (see *Smith* v. *Texas,* supra, 311 U.S., at page 130; *Akins* v. *Texas,* supra, 325 U.S., at page 403; *Zimmerman* v. *Maryland,* 336 U.S. 901; in any event the validity of the territorial statutes was not attacked). Selection represents an exercise of judgment based on the opinions of the jury commisioners as to qualifications.

All of the above difficulties have been anticipated and obviated by the rule that proportional representation is not required (*United States* v. *Local 36 of International Fishermen,* 70 F. Supp. 782, D.C.S.D. Cal. 1947, citing and following *Wong Yim* v. *United States,* 118 F. 2d 667, C.A. 9 (which held that proportionate representation of races is not required)). There is no case where proportionate representation has been required by either Supreme Court

policy or the Fifth Amendment or the Fourteenth Amendment. Even though the court below thought that *intentional* economic or occupational weighting played a part in this case (R. 505), what the court does not explain is how a jury commissioner can be convicted of doing the wrong thing unless there first is set up a norm or standard of what he should have done. But this in turn leads right back to the proposition that occupational proportionate representation is not required, that is, a jury commissioner is not required to exercise his power of selection with a view to securing proportional representation.

In Supreme Court cases, where, incidentally, the decisions are not based upon the Fifth Amendment but upon the power of the Supreme Court to supervise the administration of justice in the inferior federal courts, no allegation of intentional economic or occupational weighting has been involved. The *Thiel* case held that intentional exclusion (undisputed) of daily wage earners was improper, and the *Ballard* case held that intentional exclusion (conceded) of women was improper under the particular facts. Both cases indicated that even on the basis of policy the Supreme Court would not set up a requirement of group proportional representation. The vice was group *exclusion*. This is even clearer in the light of *U.S.* v. *Gottfried,* 165 F. 2d 360 (C.A. 2d, 1948), cert. denied 333 U.S. 860, rehearing denied 333 U.S. 883, where Judge Learned Hand held to be valid the method of drawing jurors for the District Court of the United States for the Southern District of New York. In that district, all jurors were drawn from the three predominantly urban counties, and no jurors were drawn from the eight predominantly rural counties. Of necessity, such juries are weighted in favor of urbans and against rurals. The district court had so used its power to divide the district geographically that this result had been brought about, and the Constitution did not forbid it.

Plaintiffs neither alleged nor attempted to prove intentional *exclusion,* as distinguished from weighting, based upon a person's occupation or economic status. If they had, they would have been blocked by the fact that there were six laborers out of 50 persons on the grand jury list (R. 1432-1436).

The court below twisted Commissioner Pombo's explanation of the number of haoles on the grand jury and his opinion as to the qualifications of businessmen into an admission that he deliberately refused to pick laborers because they were laborers. The way in which Commissioner Pombo's testimony was used illustrates the vice of the supposition that intentional occupational weighting is a matter for judicial inquiry going to the constitutionality of the grand jury list. Mr. Pombo, in his testimony before Judge Cristy (R. 830-831, 855) cited by the court (R. 504-505), stated that he "wouldn't know whether there was a greater percentage of haoles on the grand jury list than in the population," that he thought there were "very few haoles—17" (the court makes it 21, R. 501), that haoles, specifically referring to "the Baldwins," "want to run politics, just as well give them something to do in courts. They can't run it in here because the population getting too independent." This obviously sarcastic reference by an oldtime Democrat (R. 805) to the ascendency of his party over that of his leading Republican opponents, "the Baldwins," is distorted by the lower court into a significant admission (R. 505). So from Mr. Pombo's testimony that a man in business "has got a better head on him" (R. 855), the court concludes there was a violation of the *Thiel* case (R. 509) which actually related to the intentional and systematic *exclusion* of all daily wage earners because they were such. Mr. Pombo did not testify that laborers were excluded and the court found that there were six on the list.

Obviously, no candid jury commissioner who did not live

in a vacuum could fail to have an opinion as to whether businessmen have better heads on them. This leads back to the proposition that the rule laid down by the lower court really is a rule against jury commissioners having any opinions, it is a rule that requires them to pick the jury list by lot, and that is not the law. Moreover, the lower court conveniently overlooked: (1) Pombo's statements that he had been a champion of the laboring man for years (R. 804) and that he picked a man on his merits (R. 848); (2) Pombo's testimony that he was not a "haole" because he was a Portuguese (R. 809, see R. 1379); and (3) Judge Wirtz's statement that the jury commissioners were not concerned with the occupation of the prospective grand jurors (R. 769). But these matters cannot be overlooked. It is particularly amazing that the court built its findings of deliberate overweighting in favor of the "employer-entrepreneur-haole" group on the testimony of Mr. Pombo, who was not a member of that group on any score, i.e., he was a delinquent tax collector working for the Territory, he was an oldtime Democrat and champion of the working man, and he was not a "haole."

The alleged exclusion of women. A third alleged denial of due process is that women were intentionally excluded from the 1947 Maui County Grand Jury. It is a fact that no woman was even considered for such jury service, for the reason that Section 83 of the Organic Act (48 U.S.C., Section 635) provides that jurors shall be males. Hence, on this issue, plaintiffs confined themselves to a legal argument to the effect that the Nineteenth Amendment meant that women had to be considered for jury duty. The lower court did not take this argument seriously and held correctly that the contention was without merit, on the basis that the Nineteenth Amendment guaranteed to female citizens only the right to vote, and did not work a change in Section 83 of the Organic Act (R. 511, note 105).

XII.

THE COURT ERRED IN DENYING THE MOTION TO DISMISS THE DEFENDANTS BEVINS AND CROCKETT AFTER THEY HAD CEASED TO HOLD OFFICE.

After the opinion had been given in these cases but before entry of the decree the defendants E. R. Bevins and Wendell F. Crockett ceased to hold the positions of county attorney and deputy county attorney respectively. The attorney general filed a suggestion of the abatement of the action as to them and moved for their dismissal (R. 523-525; No. 12301, R. 87). They also sought their dismissal (R. 538-539; No. 12301, R. 88-89). The grounds presented were that the actions had become moot as to them, and that they had no longer any power or authority to act.

The court dismissed these defendants in their respective capacities as county attorney for the County of Maui and deputy county attorney for the County of Maui but retained them in the cases individually (R. 547; No. 12301, R. 93).

Under *Ex parte Young, supra,* 209 U.S. 123, 159, and *Ex parte La Prade, supra,* 289 U.S. 444, 455, from the inception of these suits they were, in legal theory, actions against individuals and not against officers in their official capacity. The office held may be descriptive of the powers claimed by a defendant but the suit cannot be maintained against him officially; instead it can only be maintained against him on the theory that he does not possess the asserted powers and is suable as an individual. The whole subject has been recently reviewed by the Supreme Court in *Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U.S. 682.

When the defendants Bevins and Crockett ceased to hold office they also ceased to claim any powers (R. 538-539; No. 12301, R. 88-89). Hence the action was moot as to them. *Chandler* v. *Dix,* 194 U.S. 590; *Pullman Co.* v. *Knott,*

243 U.S. 447; *Shaffer* v. *Howard,* 249 U.S. 200. This is in keeping with the rule that where the relief asked can no longer be granted because of a change in the circumstances the case has become moot. *Michael* v. *Cockerell,* 161 F. 2d 163, 165 (C.A. 4th 1947).

In the light of the foregoing principles, the action of the court in dismissing Messers. Bevins and Crockett in their respective capacities as county attorney and deputy county attorney but not individually was neither fish nor fowl. The court dismissed altogether other defendants who had ceased to hold office or as to whom the court found no basis for present injunctive relief (R. 516, 547; No. 12301, R. 94), and the same action should have been taken as to the defendants Bevins and Crockett.

CONCLUSION

Appellants respectfully submit that the opinion below has the status of one rendered by a single judge; that these cases squarely involve the issue of federal court intervention in pending state and territorial criminal cases, for unlawful conduct has occurred and the question presented is whether plaintiffs can be held accountable for it in the pending criminal cases; that these cases are not labor relations cases, for the union and class representatives stated no cause of action and the maxim "he who comes into equity must come with clean hands" is applicable; that in any event at the present time nothing is involved but four pending criminal prosecutions, for the statutes have been amended and the grand jury has gone out of office; that the court erred in holding that a federal equity court has jurisdiction to intervene in pending state and territorial criminal cases if it sees fit; that the court further erred in holding that discretion to so intervene was conferred upon it by the Civil Rights Act, for that Act made no exception to the statutory prohibition against injunctions staying pend-

ing proceedings; that a United States district court possesses only two powers for intervening in pending state and territorial criminal cases, one being the removal of the cause for the protection of civil rights and the other being habeas corpus; that even under these powers the federal court will not conduct a pretrial of the good faith of the prosecution before trial of the criminal cases, but will remit the accused to the state courts to proceed to final judgment; that the same is true no matter what allegations are made of local prejudice, bias of judges and discriminatory treatment; that the court further erred in holding that the good faith of the prosecution turned upon the motive of the prosecutor and then, by reviewing a number of unpleaded circumstances unrelated to any defense to the prosecutions and largely outside the record, and by characterizing the community as anti-labor and the measures taken by the prosecutor against unlawful conduct as too severe, inferring (without any showing or finding of a connection between the prosecutor and the employers or anyone else) a motive to "beat labor"; that good faith of the prosecution, subjected to a review of that nature, is simply a means for usurpation of supervisory power over the executive and legislative branches of the territorial governments, just as the court usurped appellate jurisdiction over the territorial courts; that the court below erred in using a bill in equity to review the Supreme Court of Hawaii's opinion in *Territory* v. *Kaholokula,* 37 Haw. 625; that even if the parties to that case had not been before it, the trial court lacked power to place its own construction on a territorial criminal statute, differing from the authoritative construction of the Supreme Court of Hawaii, and lacked power to strike down the statute on the basis of its own erroneous construction of the statute; that the Unlawful Assembly and Riot Act, which is a codification of common law offenses confined to breach of the peace or clear and present danger

thereof, is constitutional and valid; that the conspiracy statute is valid at least in making punishable a conspiracy to commit an offense and there was no occasion to strike down the statute in toto; that a grand jury challenge never before has been and cannot be initiated collaterally by an action in equity, and the defendants in Criminal No. 2365 should have attacked the grand jury, if such was their purpose, by plea to the second indictment; that the defendants in the other criminal cases deliberately mooted their challenges to the grand jury and prevented proper appellate review of the record in the Maui court; and that the court further erred in finding deliberate exclusion from the grand jury list of Filipinos (as distinguished from other non-caucasians of whom there were 23, including 7 Japanese and 4 Chinese) and in finding deliberate overweighting of the grand jury list in favor of an artificial employer-entrepreneur-haole group (in which the court included persons of many races and trades, even union men, in fact everyone except day laborers of whom there were 6).

The decrees below should be reversed.

DATED at Honolulu, T. H., this 27th day of January, 1950.

Respectfully submitted,

WALTER D. ACKERMAN, JR.,
individually and as Attorney General of the Territory of Hawaii, Appellant in Nos. 12300 and 12301, and Jean Lane, individually and as Chief of Police of the County of Maui, Appellant in No. 12300.

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APPENDIX

APPENDIX I.

NOTES CITED TO THE TEXT OF THE BRIEF

Note 15, cited pp. 45, 136, 138.

Section 24 (14) of the old judicial code, 28 U.S.C. 41 (14), conferred jurisdiction:

> "Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

Section 1343 of the new judicial code has revised this provision to read as follows:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> "(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 47 of Title 8;
>
> "(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 47 of Title 8 which he had knowledge were about to occur and power to prevent;
>
> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

Only paragraph (3) of this section has any relevancy, section 47 of Title 8 being neither cited in the pleadings or in any way involved.

Note 19, cited pp. 47, 86, 92, 138.

Since the Act of March 2, 1793, 1 Stat. 334, c. 22, section 5, the statutes of the United States have prohibited the granting of a writ of injunction by any court of the United States to stay proceedings in any court of a state. This statute became Revised Statutes, section 720, from which was derived section 265 of the old judicial code, 28 U.S.C. section 379, reading as follows:

> "§ *379. (Judicial Code, section 265.) Same; stay in State courts.* The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

This provision appears as section 2283 of the new judicial code, reading as follows:

> "§ *2283. Stay of State court proceedings*
>
> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

In *Alesna* v. *Rice,* 172 F. 2d 176, 179, this Court, while not passing on the precise question of the applicability of this statute in Hawaii, nevertheless stated that "if a constitutional district court is precluded by statute or rule of law from interfering in state court proceedings similar to the proceedings in which this *Rice* order was issued, the United States District Court for the District of Hawaii is precluded from interfering with the territorial court proceedings," and that "the Organic Act places the courts of

the Territory of Hawaii in a relatively similar position to the federal judicial system as are the state courts."

In the *Alesna* case this Court cited in support of the foregoing, section 86 (c), 48 U.S.C. 642, and section 86 (d), 48 U.S.C. 645, Hawaiian Organic Act. By Public Law 773, 80th Cong., 2d Sess., which enacted the new Title 28 of the United States Code as section 1 of that Act, an amendment of section 86 of the Hawaiian Organic Act was made by section 8 of that Act. The amendment continues in effect the former section 86 (d) with slightly different wording, as follows:

> "Sec. 86. The laws of the United States relating to removal of causes, appeals and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of United States and the courts of the Territory of Hawaii."

The provisions of former section 86 (c) that the United States district court for the district of Hawaii "shall have the jurisdiction of district courts of the United States," were deleted upon the enactment of the new Title 28 because the United States district court for the district of Hawaii was included in the new Title 28 as a district court of the United States. See *Stainback* v. *Mo Hock Ke Lok Po,* 336 U.S. 368, 376.

Section 86 of the Hawaiian Organic Act is an example of an adoptive statute, i.e., a statute which adopts and incorporates by reference the statutes governing a certain subject matter, thereby making such other statutes applicable to the situation covered by the adoptive statute. See *Balzac* v. *Porto Rico,* 258 U.S. 298; 2 Sutherland on Statutory Construction, 3d ed. sec. 5207. Adoptive statutes are classified as of general or specific reference, the former referring

to the law of a subject generally. The adoptive provisions of section 86 are of this general reference type.

The principle that the United States district court for the district of Hawaii occupies the same relationship to the territorial courts as exists between the courts of the United States and the state courts in the various states was firmly established in a series of cases holding that the federal rule against interference by habeas corpus with the proceedings of state courts is equally applicable in the Territory of Hawaii. *In re Marshall,* 1 U.S.D.C. Haw. 34 (1900); *In re Atcherley,* 3 U.S.D.C. Haw. 404, 421 (1909); *Soga* v. *Jarrett,* 3 U.S.D.C. Haw. 502, 506 (1910); *In re Curran,* 4 U.S.D.C. Haw. 730, 738 (1916). Another case relying on the same principle is *United States* v. *Bower,* 4 U.S.D.C. Haw. 466 (1914). The judicial pronouncements as to the relationship between the territorial system of courts and the federal court in Hawaii are confirmed by the legislative history of the Hawaiian Organic Act. Hawaiian Commission Message, Sen. Doc. No. 16, 55th Cong., 3d Sess., pp. 162-164; H. R. Rep. No. 305 (reprinted in part, R. 1856-1863) being report on H. R. 2972, 56th Cong., 1st Sess., which bill was later incorporated by the House into Sen. 222, the Hawaiian Organic Act (see H. R. Rep. No. 549, 56th Cong., 1st Sess.); 33 Cong. Rec. 1871, 1929, 1932-1934, 2025, 2123-2124, 2133, 2189, 2191-2194, 2388-2389, 2397, 2398-2400, 2441, 3771, 3801, 3859, 4358, 4649, 4733.

Note 22a, cited p. 52.

The unlawful assembly and riot act was enacted as chapter 39 of the Penal Code of 1850, June 21, 1850. This Penal Code was drafted by Chief Justice William Lee, who had come to Hawaii from New York in 1846, after studying law at Harvard Law School under such well-known jurists as Judge Story and Professor Greenleaf (R. 1835, 1838). There is no foundation for the surmise made by the lower

court (R. 443) that the Act may have been in existence prior to that time. Judge Lee stated in his preface that in drafting the Penal Code he had in the main adopted the principles of the English common law.

When Hawaii became a territory section 6 of the Hawaiian Organic Act (Act of April 30, 1900, 31 Stat. 141, 48 U.S.C. 496) continued in effect all the laws not inconsistent with the Constitution or laws of the United States, except certain laws repealed by section 7. Said sections 6 and 7 were based on the report of the Hawaiian Commission, Sen. Doc. No. 16, 55th Cong., 3d Sess. (R. 1846-1856), which shows that the commission, through its committee on judiciary, thoroughly reviewed the penal laws as well as the other laws of Hawaii, and recommended which should be continued in effect and which should be repealed. The Hawaiian commission report transmitted in full to the Congress all the laws not recommended to be repealed. The unlawful assembly and riot act and the conspiracy law were transmitted exactly in the form in which they stood at the time of these cases, except for the later changes in penalty below noted, and some changes later required because of changes in the officers mentioned in the statutes (R. 1848-1856).

That the work of the committee on judiciary of the Hawaiian commission was approved by Congress is evident upon comparison of the Hawaiian Organic Act as enacted, with the bill transmitted by the commission. See also H.R. Rep. No. 305, 56th Cong., 1st Sess., printed in part at R. 1856-1863. On the basis of the commission's report, the Hawaiian Organic Act repealed certain penal laws, such as the law relating to seditious offenses, but continued in effect without change the unlawful assembly and riot statute and the conspiracy law, as well as others. The punishment for the offense of unlawful assembly and riot when having for its object the destruction or injury of

property has remained at the maximum of two years or $500 throughout the history of the law. In other cases the maximum punishment originally was five years, or $1,000. The five years was increased to twenty years maximum by Act 4 of the Session Laws of 1929.

The court below remarked that the unlawful assembly and riot statute, appearing in the Penal Code of 1850, predated the Hawaiian constitution of 1852. This is immaterial, since the influences which secured the excellent "Declaration of Rights" in the 1852 constitution already were at work and had been for some time. In fact, the commission which drafted the 1852 constitution was appointed pursuant to action of the legislature of 1850. Chief Justice Lee was one of the commissioners so appointed to draft the 1852 constitution. (See Alexander's Brief History of the Hawaiian People, p. 272.)

A declaration of rights had been issued by Kamehameha III prior to the constitution of 1840, but it was in general terms. The constitution of 1852 was specific, e.g.:

> "ART. 3. All men may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press.
>
> "ART. 4. All men shall have the right, in an orderly and peaceable manner to assemble, without arms, to consult upon the common good; give instructions to their Representatives; and to petition the King or the Legislature for a redress of grievances."

Note 22b, cited pp. 58, 61.

The difference between the English and American law on the subject of assemblies is set forth in a note in 42 Harv. L.R. 265, 269, as follows:

> "* * * In England, the courts have gone extremely far in considering unlawful all meetings at which sedi-

tious speeches have been made [Rex v. Hunt, 1 How. St. Tr. (N.S.) 171 (1820); Regina v. Fursey, 6 C. & P. 81 (1833); Regina v. Fussell, 6 How. St. Tr. (N.S.) 723 (1848); Regina v. Burns, 16 Cox C. C. 355 (1886); see Dicey, Law of the Constitution 502; 4 Stephen, Commentaries (18th ed. 1925) 193.], but in this country the basis of the crime properly remains its tendency to produce an immediate breach of the peace [Slater v. Wood, 9 Bosw. (N.Y. 1861) 15; People v. Most, 128 N.Y. 108, 27 N.E. 970 (1891); State v. Hughes, 72 N.C. 25 (1875); Ex parte Jacobson, 55 Tex. Cr. 237, 115 S.W. 1193 (1909); Shields v. State, 187 Wis. 448, 204 N.W. 486 (1925); *cf.* People v. Kerrick, 261 Pac. 756 (Okla. 1927); Bennett, *Public Meetings and Order* (1888) 4 L.Q. Rev. 257.]. * * *"

The distinction made in this note between the English and American practice, i.e., that in this country to become unlawful an assembly must have proceeded to a point where it tends to produce an immediate breach of the peace, is borne out by such cases as *Chaplinsky* v. *New Hampshire, Terminiello* v. *Chicago, Hague* v. *CIO,* and *Sellers* v. *Johnson,* cited in the text of the brief, p. 63. Therein lies the difference made in the English law by the First Amendment.

The exact point of difference lies in the requirement made in this country that what occurs must strike terror or tend to strike terror into others, or as the common law phrase had it, be "in terrorem populi," otherwise there is no offense. This element of "in terrorem populi" was not always required in England for the offense of unlawful assembly, though it was required for riot. (*Rex* v. *Cox,* 4 Car. & P. 538, 172 Eng. Rep. 815; see Blackstone, Book IV, p. 146, pointing out that in a case of unlawful assembly, the meeting need not have proceeded to the point of overt acts if it had an unlawful purpose; 66 C.J. 39, sec. 7.) The statute of George I could be invoked without the allegation

of "in terrorem populi," *Rex* v. *James,* 5 Car. & P. 153. This opened the door to abuses, since a meeting could be found to have an unlawful purpose because it was held for the airing of grievances against the crown. *Rex* v. *Fursey,* 6 Car. & P. 80. Of course, the dissolving of assemblies that had met for the consideration of grievances against the crown was the very abuse which the bill of rights was intended to meet. In the drafting of the bill of rights, the emphasis was on this right of petition, the right of peaceable assembly being inserted in the bill of rights as a necessary adjunct thereof. (See Declaration and Resolves of the First Continental Congress, October 14, 1774; Sessions of First Congress, House of Representatives, pages 434, 732-733.) The reference to the English statute made in the footnote in the Bridges case, 314 U.S. 252, 265, footnote 9, to which the Court refers (R. 458-459), therefore is understandable.

In the Hawaiian statute "in terrorem populi" is a required element of any and every offense. That this element of the offense is demonstrative of a clear and present danger of breach of the peace has been shown in the brief, p. 63. The Hawaiian statute therefore reflects the difference made in the English law by the American law, as was to be expected since Chief Justice Lee of Hawaii, who drafted the Penal Code of 1850, had studied at Harvard under the great Judge Story.

Note 27, cited p. 57.

This Court's appellate jurisdiction over the Supreme Court of Hawaii is set forth in section 1293 of the new judicial code (formerly 28 U.S.C. 225 (a), par. Fourth), as follows:

> "§ *1293. Final decisions of Puerto Rico and Hawaii Supreme Courts*
>
> "The courts of appeals for the First and Ninth Circuits shall have jurisdiction of appeals from all final

decisions of the supreme courts of Puerto Rico and Hawaii, respectively in all cases involving the Constitution, laws or treaties of the United States or any authority exercised thereunder, in all habeas corpus proceedings, and in all other civil cases where the value in controversy exceeds $5,000, exclusive of interest and costs."

One type of appeal from the Supreme Court of Hawaii is an appeal in a civil case founded on jurisdictional amount. Such an appeal, differing from an appeal to a federal court from a state court, does confer complete power to reverse any ruling of the territorial court on law or fact, but as actually exercised this power occasions a reversal in matters of local law only in cases of clear or manifest error. *Waialua Co.* v. *Christian,* 305 U.S. 91, 109; *Castle* v. *Castle,* 281 F. 609 (C.A. 9th); *Campose* v. *Central Cambalache,* 157 F. 2d 43 (C.A. 1st). The test of clear or manifest error as laid down for courts of appeal having appellate jurisdiction over local issues in territories, and frequently recognized by this Court, is stated in *Bonet* v. *Texas Co.,* 308 U.S. 463, 471, as follows:

"We now repeat once more that admonition. And we add that mere lip service to that rule is not enough. To reverse a judgment of a Puerto Rican tribunal on such a local matter as the interpretation of an act of the local legislature, it would not be sufficient if we or the Circuit Court of Appeals merely disagreed with that interpretation. Nor would it be enough that the Puerto Rican tribunal chose what might seem, on appeal, to be the less reasonable of two possible interpretations. And such judgment of reversal would not be sustained here even though we felt that of several possible interpretations that of the Circuit Court of Appeals was the most reasonable one. For to justify reversal in such cases, the error must be clear or manifest; the interpretation must be inescapably wrong; the decision must be patently erroneous."

In the type of appeal which applies to criminal cases, jurisdiction is determined by the issues, i.e., "in all cases involving the Constitution, laws or treaties of the United States or any authority exercised thereunder." Hence this type of appeal is similar to an appeal from a state court to a federal court (Supreme Court). In this type of appeal this Court confines itself to the constitutional issues. *Kimbrel* v. *Territory,* 41 F. 2d 740 (C.A. 9th 1930); *Young* v. *Territory,* 160 F. 2d 289 (C.A. 9th 1947); *Fukunaga* v. *Territory,* 33 F. 2d 396 (C.A. 9th 1929), cert. denied 280 U.S. 593.

Note 41, cited pp. 70, 99, 118.

Under the indeterminate sentence law imprisonment could not be imposed without being subject to parole upon expiration of a minimum term, to be fixed by the board of paroles and pardons after a full investigation, and approved by the court, who could modify it (Section 10842, Revised Laws of Hawaii 1945, as amended by Act 199 (Series D-164) Session Laws of Hawaii 1947. The amendment made no substantial change). Upon being paroled the parolee could obtain his final discharge by satisfying the board of paroles and pardons, subject to the approval of the governor, that he would "remain at liberty without violating the law and that his final release is not incompatible with the welfare of society" (Section 3963, Revised Laws of Hawaii 1945). While the parole would last for the maximum term of imprisonment if such final discharge was not sooner obtained, there were many possible dispositions of these cases (in the event of a verdict of guilty) not involving any imprisonment.

Thus the court might suspend the imposition of sentence, or might impose it and suspend its execution (Section 10843, Revised Laws of Hawaii 1945). In the event of such suspension the resultant period of probation could

not exceed five years, and of course could be fixed at any less period by the court.

Of course no imprisonment at all might be involved, as the court might impose a fine and nothing more.

Upon writ of error to the Supreme Court of Hawaii the sentence, if deemed excessive by the court, might be reduced by that court (Section 9564, Revised Laws of Hawaii 1945). In fact, the Supreme Court of Hawaii has used such power to nullify altogether a sentence of imprisonment and impose a fine instead, where it deemed the imposition of imprisonment to be an abuse of discretion. (*Territory* v. *Kunimoto,* 37 Haw. 591; *Territory* v. *Chong,* 36 Haw. 537.)

Note 42, cited p. 71.

The conspiracy statute, like the unlawful assembly and riot act, was enacted by the Penal Code of 1850, and like the unlawful assembly and riot act it was transmitted to the Congress by the report of the Hawaiian commission and was continued in effect without change by section 6 of the Hawaiian Organic Act (See note 22a, *supra*). At the time of these cases the statute stood in the same form in which it was transmitted to and continued in effect by Congress, except for a change in the maximum fines enacted by Act 99 of the Session Laws of 1935.

Note 61, cited p. 84.

That there is an important distinction between pending state criminal prosecutions and those which are merely threatened to be brought if a certain course of conduct is continued, and that it is mandatory upon a United States district court to abstain from issuing injunctive relief against pending state criminal prosecutions, is held in *Cline* v. *Frink Dairy Co.*, 274 U.S. 445, 452-453. This was a case in which a district attorney had filed an information in the state criminal court under a state anti-trust act alleged to

be unconstitutional, and further prosecutions were threatened. The three-judge district court held the statute unconstitutional and issued an injunction both against the pending criminal prosecution and also against the threatened further prosecutions. One judge dissented from the decree so far as it was directed against the actual proceedings pending in the criminal court. The Supreme Court held that a clear showing of irreparable injury entitling the plaintiff to injunctive relief had been made and that the statute was unconstitutional. But as to the pending criminal proceedings the decree was modified "so far as it purports to enjoin the defendant from proceeding further in prosecuting the information under that Act against the plaintiffs now pending in the state criminal court."

Considering this feature of the case on pages 452-453 of 274 U.S., the Supreme Court held that "the general rule is that a court of equity is without jurisdiction to restrain criminal proceedings to try the same right that is in issue before it; * * *" (pages 451-452), and then held that the exception to this rule for the enjoining of such prosecutions under alleged unconstitutional enactments does not apply to pending criminal proceedings. The court so held on the authority of *Ex parte Young,* 209 U.S. 123, 162:

> "* * * But the Federal court cannot, of course, interfere in a case where the proceedings were already pending in a state court. *Taylor* v. *Taintor,* 16 Wall. 366, 370; *Harkrader* v. *Wadley,* 172 U.S. 148."

After so quoting from *Ex parte Young,* the court concluded in the *Cline* case:

> "We, therefore, agree with the view of the dissenting Judge that the injunction is too broad, in so far as it restrains proceedings actually pending, and that it must be accordingly modified." (P. 453.)

The above distinction between pending and merely threatened prosecutions was made by this Court in *Babcock*

v. *Noh,* 99 F. 2d 738 (C.A. 9th 1938), which is cited in *Alesna* v. *Rice,* 172 F. 2d 176 (C.A. 9th 1949), cert. denied October 10, 1949. In the *Alesna* case this Court did not go into the distinction between pending and threatened criminal prosecutions, since it was satisfied that the court below should not have entertained the application for injunctive relief.

The district courts generally have followed the distinction between pending and merely threatened criminal proceedings, and have refused injunctions against pending criminal proceedings. *Priceman* v. *Dewey,* 81 F. Supp. 557, 559 (D.C.E.D. N.Y. 1949); *Society of Good Neighbors* v. *Groat,* 77 F. Supp. 695 (D.C.E.D. Mich. 1948). In *Jewel Tea Co.* v. *Lee's Summit, Mo.,* 198 Fed. 532 (D.C.W.D. Mo. 1912), affirmed sub. nom. *City of Lee's Summit* v. *Jewel Tea Co.,* 217 Fed. 965 (C.A. 8th 1914), in disposing of a bill to restrain enforcement of a licensing ordinance found to be an interference with interstate commerce, the district court restricted its decree to future prosecutions under the ordinance and dissolved a temporary injunction improvidently issued against pending prosecutions; the court of appeals sustained the decree. In *Spence* v. *Cole,* 137 F. 2d 71 (C.A. 4th 1943), it appears that the district court did not enjoin prosecutions already pending for violations of the ordinance attacked as unconstitutional, but only restrained future prosecutions, as to which restraint of future prosecutions the court of appeals reversed on the authority of *Douglas* v. *Jeannette,* 319 U.S. 157.

The leading case showing that the rule against enjoining pending criminal prosecutions is jurisdictional is *In re Sawyer,* 124 U.S. 200 (1888). In that case the action of a federal court of equity in issuing an injunction against the removal from office of a city police judge occasioned a review of the jurisdiction of equity. In holding that the injunction was without jurisdiction and that violation of

it could not be punished, the Supreme Court so held upon analogy to the rules governing equity jurisdiction over criminal prosecutions. The court said:

> "The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, or for the removal of public officers, is to invade the domain of the courts of common law, or of the executive and administrative department of the government." (124 U.S. at p. 210.)

The next case is *Harkrader* v. *Wadley,* 172 U.S. 148 (1898). This involved a petition for a writ of habeas corpus to effectuate an injunction which the petitioner had obtained against further prosecution under a certain indictment. The petitioner had been committed to the custody of a sheriff and held to answer said indictment, notwithstanding the injunction. The grant of the writ of habeas corpus was reversed by the Supreme Court and the petitioner was directed to be restored to the custody of the sheriff. The court held that both under Revised Statutes 720 (the statute considered in part B of Point VI of the brief and in note 19, supra) and under the rule of *In re Sawyer, supra,* there was no authority to issue the injunction against proceedings under the indictment. It was urged that the jurisdiction of the federal court had first attached because prior to the institution of the state criminal proceedings the petitioner had been made a party to the federal equity suit, and the equity suit involved the same facts as those involved in the later criminal proceeding. The court held that this circumstance did not obviate application of the rule, which it stated as follows:

"* * * that a Circuit Court of the United States, sitting in equity in the administration of civil remedies, has no jurisdiction to stay by injunction proceedings pending in a state court in the name of a State to enforce the criminal laws of such State." (172 U.S. at p. 170.)

The *Harkrader* case did not involve the constitutionality of a state criminal statute. This was involved in *Ex parte Young, supra,* 209 U.S. 123, 149-166, where the power of a federal equity court to enjoin a state law enforcement officer from enforcing a criminal statute on the ground of its alleged unconstitutionality was considered. In upholding the jurisdiction of the federal equity court in such a case, the Supreme Court made it clear that "the federal court cannot, of course, interfere in a case where the proceedings were already pending in a state court" (209 U.S. at p. 162), which was quoted and followed in *Cline* v. *Frink Dairy Co., supra,* as above noted.

That the rule against invasion of state criminal proceedings by a federal equity court is jurisdictional further appears from *Broad-Grace Arcade Corp.* v. *Bright,* 284 U.S. 588, on appeal from the decision reported below, 48 F. 2d 348. The district court of three judges had declined to issue an interlocutory injunction in a case involving both the constitutionality of the Virginia Sunday law and the alleged denial of equal protection in the administration of the law. The plaintiff corporation's manager had been arrested and convicted under the law and the case was on appeal. Further arrests were threatened. In affirming by a memorandum opinion the denial of the interlocutory injunction, the Supreme Court said it did so "without prejudice to the power and duty of the district court, as specially constituted, to inquire and determine *whether the court has jurisdiction (Judicial Code, s. 37; U.S. Code, Title 28, s. 80)* [italics added] both in relation to the amount involved in

the controversy [citations omitted] and with respect to the right of the complainant to maintain this suit in equity [citations omitted]." The citation of U.S. Code, Title 28, section 80, squarely places the issue in the jurisdictional area, for this section provided:

> "§ *80. (Judicial Code, section 37.) Same; dismissal or remand.* If in any suit commenced in a district court, or removed from a State court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

In incorporating this section in the new Judicial Code, the revisers omitted as unnecessary the portion thereof relating to dismissal of an action not really and substantially involving a dispute or controversy within the jurisdiction of the district court, the reviser's note stating: "Any court would dismiss a case not within its jurisdiction when its attention is drawn to the fact, or even on its own motion" (Reviser's Notes to section 1559, Revised Title 28).

Another recent case showing that the lack of authority of a federal equity court to restrain pending criminal proceedings goes to the jurisdiction of the court is *Priceman* v. *Dewey,* supra, 81 F. Supp. 557, 559. The district judge refused to convene a three-judge court and dismissed the complaint on the ground of lack of jurisdiction to restrain the pending state court prosecution; if the allegations of the

complaint had shown jurisdiction then, as the district court recognized, a three-judge court would have had to be convened since unconstitutionality of the state law was alleged.

While a threatened future prosecution interfering with the continued enjoyment of rights may be enjoined, this power is sparingly used. As said in *Fenner* v. *Boykin,* 271 U.S. 240, in refusing an injunction against a threatened arrest and prosecution:

> "* * * Ordinarily, there should be no interference with such officers; primarily, they are charged with the duty of prosecuting offenders against the laws of the State and must decide when and how this is to be done. The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection. The Judicial Code provides ample opportunity for ultimate review here in respect of federal questions. *An intolerable condition would arise if, whenever about to be charged with violating a state law, one were permitted freely to contest its validity by an original proceeding in some federal court. Hygrade Provision Co.* v. *Sherman,* 266 U.S. 497, 500." (Pp. 243-244, italics added.)

Note 69, cited p. 90.

The provisions of the removal statute relating to the protection of civil rights are as follows:

28 U.S.C. Sec. 74

> "§ *74. (Judicial Code, section 31.) Same; causes against persons denied civil rights.* When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or can not enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within

the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said State court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next district court to be held in the district where it is pending * * *."

Title 28 Revised Code, Sec. 1443.

"§*1443. Civil rights cases*

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

"(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law."

Note 85, cited pp. 99, 102-103, 123, 133.

Collective bargaining, association of employees in labor organizations, work stoppages, and picketing are not absolute rights. *Algoma Plywood & Veneer Co.* v. *Wisconsin Board,* 336 U.S. 301; *International Union UAW* v. *Wisconsin Board,* 336 U.S. 245; *Lincoln Labor Union* v. *Northwestern Iron & Metal Co.,* 335 U.S. 525; *A. F. of L.* v. *American Sash & Door Co.,* 335 U.S. 538; *Giboney* v. *Empire Storage & Ice Co.,* 336 U.S. 490.

Use of force and violence in a labor dispute may be quelled without consideration of the impact on labor relations and without conflict with the Labor Management Relations Act 1947. Thus in *International Union, UAW* v. *Wisconsin Board, supra,* 336 U.S. 245, the court said:

> "* * * While the Federal Board [National Labor Relations Board] is empowered to forbid a strike, when and because its purpose is one that the Federal Act made illegal, it has been given no power to forbid one because its method is illegal — even if the illegality were to consist of actual or threatened violence to persons or destruction of property. *Policing of such conduct is left wholly to the states.* In this case there was also evidence of considerable injury to property and intimidation of other employees by threats and *no one questions the State's power to police coercion by those methods.*" (336 U.S. at p. 253, italics added.)

In *Sanford* v. *Hill,* 316 U.S. 647, the Supreme Court dismissed for want of a substantial federal question an appeal from a state court denial of habeas corpus. The petition for habeas corpus attacked a Texas statute which made it a felony to use force or violence to prevent another from engaging in a lawful occupation. The state court's judgment, *Ex parte Sanford,* 144 Tex. Cr. App. 430, 157 S.W. 2d 899, was based on *Ex parte Frye,* 143 Tex. Cr. App. 9, 156 S.W. 2d 531, 534, from which it appears that in quelling violence in a labor dispute a state not only is not required to consider the impact on labor relations but moreover may treat an assault which has as its object to prevent another from pursuing his occupation, as a more aggravated offense than an ordinary assault. This Texas statute is the same as the Arkansas statute, the second section of which was involved and upheld in *Cole* v. *Arkansas,* decided December 5, 1949, 338 U.S. 345, 94 L.Ed. Adv. Op. 139.

The Labor Management Relations Act 1947 itself makes it an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the right to refrain from striking, i.e., the right to work in the face of a strike. It is so held by the National Labor Relations Board on the authority of section 8 (b) (1) (A) and section 7, 61 Stat. 136, 140-141, 29 U.S.C. Supp. 158 (b) - (1) (A) and 157. In *In re ILWU, Sunset Line & Twine Co.,* 79 N.L.RB. No. 207, Case No. 20-CB-1 (October 22, 1948) the ILWU was held responsible for intimidating acts, including mass picketing physically obstructing ingress. The ILWU contended that "strikebreakers are guaranteed no rights by the Act [labor management relations act]," but the board disagreed. The ILWU also asserted that these coerced employees were entitled to no protection because the employer precipitated the strike. The board held that unlawful conduct of the employer, if established, would not extinguish the rights of the coerced employees. See also *In re Local 1150, United Electrical, Radio & Machine Workers,* 84 N.L.R.B. No. 110, Case No. 13-CB-5 (June 30, 1949).

Note 90, cited p. 108.

The below analysis of United States Supreme Court cases starts with the *Hague* case which is the foundation of the "good faith rule," as appears from *Douglas* v. *Jeannette.*

Hague v. *CIO,* 307 U.S. 496. Plaintiffs alleged and showed that they sought to hold public meetings and distribute literature in Jersey City, that their activities were peaceful and performed without violence or other unlawful methods, that an ordinance prohibited the holding of meetings without a permit and such permit had been refused and plaintiffs were threatened with arrest if they held such meetings; that under another ordinance prohibiting the distribution of literature plaintiffs and their asso-

ciates, while acting in an orderly and peaceful manner, had been arrested and carried outside the city; and that defendants had adopted a deliberate policy of excluding and removing plaintiffs' agents from Jersey City. An injunction against continuance of defendants' conduct was sought. No pending prosecutions were involved. The decree as modified held the ordinances void and enjoined their enforcement. It moreover prohibited the defendants from removing persons from Jersey City or confining them without lawful arrest and production for judicial hearing.

Beal v. *Missouri-Pacific R.R.,* 312 U.S. 45, 49. Plaintiff sought to enjoin the state officers from prosecuting plaintiff's agents under the Nebraska Full Train Crew Law. No prosecutions were pending; an investigation had been made by the Railway Commission which had referred the facts to the attorney general for determination as to whether a criminal offense had been committed. The attorney general had alleged that if he decided to prosecute at all, he would conduct a single test suit. The lower court proceeded on the theory that the plaintiff's complaint showed compliance with the state law and that a criminal prosecution would be an abuse of power and should be restrained (108 F. 2d 897, 901). The Supreme Court held that whether plaintiff was acting lawfully or unlawfully was for the state courts to decide, and it was in this connection that the court said: "No citizen or member of the community is immune from prosecution, in good faith, for his alleged criminal acts. The imminence of such a prosecution even though alleged to be unauthorized and hence unlawful is not alone ground for relief in equity * * *." (312 U.S. at p. 49.)

Watson v. *Buck,* 313 U.S. 387, is a case holding that actual threats of enforcement and the irreparable injury resulting if those threats are carried out must be shown before restraint of criminal proceedings is justified. No

pending prosecutions were involved. The court quoted verbatim from the *Beal* case in support of the general rule that federal injunctions against state criminal statutes are not to be granted as a matter of course, even if such statutes are unconstitutional.

Douglas v. *Jeannette,* 319 U.S. 141, was a suit to restrain threatened criminal prosecutions. It appears from the opinion of the trial court in 89 F. Supp. 33, where the facts are said to be parallel to those in the companion case of *Reid* v. *Brookville,* 39 F. Supp. 30, that no pending prosecutions were involved. It there is noted (page 32) that injunctions were sought "against threatened future enforcement of the ordinances against Jehovah's Witnesses, but not upon any prior convictions against them." From the opinion of the court of appeals in the Jeannette case (130 F. 2d 652, 655) it appears that this trial court statement had reference to a group of convictions then on appeal. There had been more than fifty-one arrests before this last group, and many convictions.

The trial court issued a decree on the theory of preventing "continuing invasion of property or constitutional rights" (p. 32), i.e., the right of Jehovah's Witnesses to sell religious literature. Holding invalid ordinances which required licenses for such acts the trial court enjoined enforcement of the ordinances against Jehovah's Witnesses "when engaged in the advocacy of their religious views by the sale of books, periodicals and tracts." The court of appeals disagreed on the merits of the ordinance, upholding its constitutionality (130 F. 2d 652). The Supreme Court, while agreeing with the trial court that the ordinance as applied was unconstitutional, it having just so held in *Murdock* v. *Pennsylvania,* 319 U.S. 105, nevertheless held that the bill was without equity. After stating, in the language of the *Beal* case, that "No person is immune from prosecution in good faith for his alleged criminal acts," the court

continued with the explanation that "Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction" (P. 163). The court then held that the declared intention to institute other prosecutions was not sufficient to establish irreparable injury; this in itself in view of the number of arrests which had already been made, the numerous members of the group who were threatened with prosecution, and the already adjudicated unconstitutionality of the licensing requirement, is significant as to what the court meant by good faith. But the court at the bottom of page 164 specifically shows that it was the situation in the *Hague* case which it had in mind in talking about good faith, the court saying, "the case differs from Hague v. CIO, supra, 501-02, where local officials forcibly broke up meetings of the complainants and in many instances forcibly deported them from the state without trial."

Note 122, cited p. 135.

The grand jury issue was mooted in No. 12300. First, as to the 1947 Maui County Grand Jury, its term expired on January 12, 1948 (see sections 9638 and 9802, Revised Laws of Hawaii 1945, appendix VII). Prior thereto, it took no action, because the temporary restraining orders of December 1 and December 10, 1947, prevented the presentation of evidence to it. Hence, the court could not have given plaintiffs any effectual relief so far as the 1947 grand jury is concerned. Second, as to the 1948 Maui County Grand Jury, plaintiffs did not raise an issue concerning its composition (although if the plaintiffs were right in their contention in No. 12301 that they could initiate a grand jury challenge in the federal court,

they could have done the same thing in No. 12300 as to the 1948 grand jury by a supplemental pleading under Rule 15 (d) of the Federal Rules of Civil Procedure). Since such grand jury was not in issue, the court could not have granted the plaintiffs any relief so far as the 1948 grand jury is concerned. Hence, in No. 12300 the grand jury issue was mooted. *Mills* v. *Green,* 159 U.S. 651; *Jones* v. *Montague,* 194 U.S. 147, 151, 152; *Richardson* v. *McChesney,* 218 U.S. 487, 492; *Otis* v. *International Mercantile Marine Co.,* 95 F. 2d 539, 541 (C.A. 9th).

APPENDIX II.

THE UNLAWFUL ASSEMBLY AND RIOT ACT

as it read at the time of the cases below.

(From the Revised Laws of Hawaii 1945)

Chapter 277. Riots and Unlawful Assemblies.

Sec. 11570. Unlawful assembly defined. Where three or more persons are, of their own authority, assembled together with disturbance, tumult and violence, and striking terror or tending to strike terror into others, such meeting is an unlawful assembly within the meaning of the provisions of this chapter.

Sec. 11571. Riot defined. A riot is where three or more being in unlawful assembly join in doing or actually beginning to do an act, with tumult and violence, and striking terror, or tending to strike terror into others.

Sec. 11572. Menacing demonstrations. Menacing language, or gestures, or show of weapons or other signs or demonstrations tending to excite terror in others, are sufficient violence to characterize an unlawful assembly or riot.

Sec. 11573. Concurrence in intent. Concurrence in an intent of tumult and violence, and in any violent tumultuous act, tending to strike terror into others, is a sufficient joining in intent to constitute a riot, though the parties concerned did not previously concur in intending the act. For example, where persons present at a public performance concur in the intent to disturb the same by tumult and violence, tending to strike terror; or concur in one or more acts of tumult or violence tending to strike terror, done by any of the assembly.

Sec. 11574. Tumult and violence though assembled lawfully. It is not requisite in order to constitute an unlawful assembly or riot, that persons should have come together with a common or unlawful intent, or in any unlawful manner; or that the object of the meeting, or the act done or intended, should of itself be unlawful. The tumult and violence tending to excite terror, characterize the offense, though the persons may have assembled in a lawful manner, and though the object of the meeting, if legally pursued, or the act done or intended, if performed in a proper manner, would be lawful.

Sec. 11575. Promoting or aiding. Persons present at a riot or unlawful assembly, and promoting the same, or aiding, abetting, encouraging or countenancing the parties concerned therein by words, signs, acts or otherwise, are themselves parties thereto and principles therein.

Sec. 11576. Remaining after order to disperse. In case of an unlawful assembly being by proclamation or otherwise ordered to disperse by any one having legal authority to disperse the same, any one voluntarily remaining in the assembly after notice of the order, except for keeping the peace, is thereby a party concerned in the unlawful assembly.

Sec. 11577. Notice of order presumed. Every person present in an unlawful assembly is presumed to have notice of an order given by lawful authority in lawful manner for the same to disperse.

Sec. 11578. Penalty where object is injury of house, etc. Whoever is guilty of a riot or unlawful assembly, having for its object the destruction or injury of any house, building, bridge, wharf, or other erection or structure; or the destruction or injury of any ship or vessel, or the furniture, apparel or cargo thereof, shall be punished by imprisonment at hard labor not more than two years, or by fine not exceeding five hundred dollars; and shall also be answerable to any person injured to the full amount of his damage.

Sec. 11579. Penalty where persons are endangered. Whoever is guilty of being a party concerned in a riot or unlawful assembly endangering the life, limb, health or liberty of any person, or in any other riot or unlawful assembly, not of the description designated in section 11578, shall be punished by a fine not exceeding one thousand dollars or by imprisonment at hard labor for not more than twenty years.

Sec. 11580. Riot, unlawful assembly. If upon the trial of any person for being concerned in a riot or unlawful assembly as described in section 11579, the jury shall not be satisfied that such person is guilty thereof, but shall be satisfied that he is guilty of any offense mentioned in section 11578, then the jury may return as their verdict that he is not guilty of the offense charged, but is guilty of such offense, and he may be punished accordingly.

DISPERSION OF UNLAWFUL ASSEMBLIES.

Sec. 11581. By officers. In case of any riot or unlawful assembly in any town, village or district, it shall be the duty of every district magistrate there resident, and also

of the high sheriff, sheriff, and his deputies, and of the chief of police for the town, village or district to go among the persons so assembled, or as near to them as may be with safety, and in the name of the Territory to command all the persons so assembled immediately and peaceably to disperse; and if the persons shall not thereupon so disperse, it shall be the duty of each of the officers to command the assistance of all persons present, in seizing, arresting and securing in custody the persons so unlawfully assembled, so that they may be proceeded with for their offense according to law.

Sec. 11582. Posse comitatus. If any persons riotously or unlawfully assembled, who have been commanded to disperse by the high sheriff, sheriff, deputy sheriff, chief of police, or district magistrate, shall refuse or neglect to disperse without unnecessary delay, any two of the officers may require the aid of a sufficient number of persons in arms, or otherwise, as may be necessary, and shall proceed in such manner as in their judgment shall be expedient forthwith to disperse and suppress the unlawful, riotous, or tumultuous assembly, and seize and secure the persons composing the same, so that they may be proceeded with according to law.

Sec. 11583. Orders to. Whenever an armed force shall be called out for the purpose of suppressing any tumult or riot or unlawful assembly, or to disperse any body of riotous men, the armed force shall obey such orders for suppressing the riot or tumult or for dispersing and arresting the persons who are committing any of the said offenses, as they may receive from the high sheriff, sheriff, or chief of police, and also such further orders as they may receive after they shall arrive at the place of the unlawful, riotous or tumultuous assembly, as may be given by any two of the magistrates or officers mentioned in the preceding section.

Sec. 11584. Persons killed or wounded. If by reason of the efforts made by any two or more such magistrates or officers, or by their direction, to disperse the unlawful, riotous or tumultuous assembly, or to seize and secure the persons composing the same, who have refused to disperse, any such person or any other person then present, as spectators or otherwise, shall be killed or wounded, the magistrates and officers and all persons acting by their order or under their direction shall be held guiltless and justified by law, and if any of the magistrates or officers, or any person acting under their authority or by their direction shall be killed or wounded, all the persons so at the time unlawfully, riotously or tumultuously assembled, and all other persons who, when commanded or required, shall have refused to aid and assist the magistrates or officers, shall be held answerable therefor.

APPENDIX III.

ACT 62 OF THE SESSION LAWS OF HAWAII 1949

AN ACT

RELATING TO RIOTS AND THE DISPERSION OF PERSONS PRESENT THEREAT, DEFINING OFFENSES IN CONNECTION THEREWITH AND PRESCRIBING PUNISHMENT THEREFOR, AMENDING CERTAIN SECTIONS OF CHAPTER 277 OF THE REVISED LAWS OF HAWAII 1945, REPEALING OTHER SECTIONS OF SAID CHAPTER, AND DEFINING THE APPLICATION OF RELATED STATUTES AND RULES OF LAW.

BE IT ENACTED BY THE LEGISLATURE OF THE TERRITORY OF HAWAII:

SECTION 1. Section 11571 of Chapter 277 of the Revised Laws of Hawaii 1945 is hereby amended to read as follows:

"*Sec. 11571. Riot defined.* Any use of force or violence, disturbing the public peace, or any threat or attempt to use such force or violence, if accompanied by immediate power of execution, by six or more persons acting together, and without authority or justification by law, is a riot."

SECTION 2. Section 11579 of Chapter 277 of the Revised Laws of Hawaii 1945 is hereby amended to read as follows:

"*Sec. 11579. Penalty for riot.* Every person who participates in any riot is guilty of a felony and shall be punished by fine not exceeding one thousand dollars or by imprisonment at hard labor for not more than two years, or both such fine and imprisonment."

SECTION 3, Section 11581 of Chapter 277 of the Revised Laws of Hawaii 1945 is hereby amended to read as follows:

"*Sec. 11581. Remaining present at place of riot after order to disperse.* If a magistrate, police officer, or other peace officer, during or following the commission of a riot in which force or violence has been used disturbing the public peace, shall order the persons present at the place of such riot to disperse, any person thereafter remaining present at the place of such riot is guilty of a misdemeanor, unless (1) he so remains because of ignorance of such order; or (2) as a magistrate, police officer, or other peace officer, or at the request or command of a magistrate, police officer, or other peace officer, he is endeavoring to effect or assisting in the dispersion so ordered, or the protection of persons or property, or the arrest of offenders. The duties and functions of magistrates, police officers, and other peace officers, provided for by this section, are in addition to those provided for by any other law relating to the preservation of the public peace or the prevention or suppression of acts affecting the public peace.

"Whoever is guilty of a misdemeanor under this section shall be punished by a fine not exceeding five hundred dollars or by imprisonment for not more than one year, or both such fine and imprisonment."

SECTION 4. Sections 11570, 11572 to 11579, inclusive, 11580, 11582, 11583, and 11584 of Chapter 277 of the Revised Laws of Hawaii 1945 are hereby repealed; provided, that the repeal of said sections shall not be construed (1) as relieving or depriving any magistrate, peace officer, or other person of any power, duty, function, immunity, or defense of justification which, pursuant to any other statute or rule of law, pertains to him, or would pertain to him had such repealed sections never been enacted, or (2) as in derogation of the application to the subject matter of Chapter 277 of the Revised Laws of Hawaii 1945, as amended by this Act, of any other statute or rule of law applicable thereto, or which would be applicable thereto had such repealed sections never been enacted; and provided further, that all such statutes and rules of law relating to the powers, duties, functions, immunities, and defenses of justification of magistrates, peace officers, and other persons, or in anyway relating to the subject matter of Chapter 277 of the Revised Laws of Hawaii 1945, as amended by this Act, shall apply to the same extent and in the same manner as if such repealed sections had never been enacted.

SECTION 5. Chapter 277 of the Revised Laws of Hawaii 1945 is hereby further amended by amending the chapter heading to read "Riots and the Dispersion Thereof," and by deleting the subtopic heading which precedes Section 11581.

SECTION 6. This Act shall take effect on its approval; provided, that this Act shall not affect the liability of any person to prosecution and punishment for the offense of

riot committed prior to said effective date and all such offenses may be prosecuted and punished the same as if this Act had not been enacted; provided further, that in no event shall the punishment for any such offense exceed the punishment provided for the offense of riot by Section 11579 of the Revised Laws of Hawaii 1945, as amended by this Act.

SECTION 7. If any section, sentence, clause or phrase of this Act, or its application to any person or circumstances, is for any reason held to be unconstitutional or invalid, the remaining portions of this Act, or the application of this Act to other persons or circumstances, shall not be affected. The Legislature hereby declares that it would have passed this Act and each section, sentence, clause or phrase thereof, irrespective of the fact that any one or more other sections, sentences, clauses or phrases be declared unconstitutional or invalid.

Approved this 21st day of April, A.D. 1949.

INGRAM M. STAINBACK,
Governor of the Territory of Hawaii.

APPENDIX IV.

THE CONSPIRACY STATUTE

as it read at the time of the cases below.

(From the Revised Laws of Hawaii 1945)

CHAPTER 243. **CONSPIRACY.**

Sec. 11120. Defined; examples. A conspiracy is a malicious or fraudulent combination or mutual undertaking or concerting together of two or more, to commit any offense or instigate any one thereto, or charge any one therewith; or to do what plainly and directly tends to excite or occa-

sion offense, or what is obviously and directly wrongfully injurious to another:

For instance—A confederacy to commit murder, robbery, theft, burglary or any other offense prohibited by law; to prevent, obstruct, defeat or pervert the course of justice, by suborning a witness, tampering with jurors, or the like offenses; to groundlessly accuse any one of, and cause him to be prosecuted for, an offense; to charge any one with an offense, with the intent and for the purpose of extorting money from him; to falsely charge one with being the father of an illegitimate child; to cheat another by means of false tokens and pretenses; to manufacture a spurious article for the purpose of defrauding whomsoever the same can be sold to; to destroy a will and thereby prejudice the devisees; to prevent another, by indirect and sinister means, from exercising his trade, and to impoverish him; to establish, manage or conduct a trust or monopoly in the purchase or sale of any commodity.

Sec. 11121. Joining in after formation. Any person knowingly acceding to and joining in a conspiracy after the same is formed, is a party thereto, no less than the one who originally takes part in forming the same.

Sec. 11122. Act in pursuance of, unnecessary. It is not requisite that the act agreed upon should be done or attempted in pursuance of the conspiracy; the conspiracy itself constitutes the offense.

Sec. 11123. Act of any is that of all. The act of each party to a conspiracy, in pursuance thereof, is the act of all.

Sec. 11124. Husband and wife. Husband and wife cannot by themselves without others, be guilty of a conspiracy, and the acts or confessions of either are not evidence against the other in a prosecution for conspiracy.

PROCEDURE.

Sec. 11125. Trial joint or several. Conspirators may be tried jointly or severally. But to prevent oppression by joining parties, and thus depriving some of the testimony of others, it is provided that in the trial of any one for a conspiracy, another, charged as a co-conspirator, may be a witness, and in such case the two may be seperately tried, though joined in the indictment.

Sec. 11126. Conspiracy and offense both not punishable. Where one is convicted of any offense, he is not liable thereafter to be tried for or convicted of a conspiracy to commit the same; and if a conspiracy to commit an offense and the commission of the same be charged in the same indictment, the defendant is liable to be sentenced for one only.

Sec. 11127. Trivial offense. On a prosecution for conspiracy, if the jury find, or the magistrate having jurisdiction of the fact consider, the offense to be trivial, the defendants shall be discharged, with or without costs, in the discretion of the court.

DEGREES, PENALTIES.

Sec. 11128. First degree. Conspiracy to commit, or to instigate to the commission of a felony; or to charge any one with felony; or to prevent, obstruct, defeat, or pervert the course of justice; or to forge or counterfeit or cheat to an amount exceeding one hundred dollars, is in the first degree, and shall be punished by imprisonment at hard labor not more than ten years, or by fine not exceeding ten thousand dollars.

Sec. 11129. Second degree. A conspiracy to establish, create, manage or conduct a trust or monopoly in the purchase or sale of any commodity is in the second degree, and

shall be punished by imprisonment at hard labor not more than two years, or by fine not exceeding one thousand dollars.

Sec. 11130. Third degree. Conspiracy not appearing to be in the first or second degree, is in the third degree, and shall be punished by imprisonment of not exceeding one year and by fine not exceeding four hundred dollars.

APPENDIX V.

ACT 10 OF THE SPECIAL SESSION LAWS OF HAWAII 1949

AN ACT

RELATING TO CONSPIRACY, AMENDING SECTIONS 11120, 11128 AND 11129 OF THE REVISED LAWS OF HAWAII 1945, REPEALING SECTIONS 11127 AND 11130 THEREOF, AND ENACTING A NEW SECTION OF THE REVISED LAWS OF HAWAII 1945 TO BE NUMBERED 11127.01.

BE IT ENACTED BY THE LEGISLATURE OF THE TERRITORY OF HAWAII:

SECTION 1. Section 11120 of the Revised Laws of Hawaii 1945 is hereby amended to read as follows:

"*Sec. 11120. Conspiracy defined.* If two or more persons conspire:

1. To commit any offense, or
2. To instigate or incite another or others to commit any offense, or
3. To bring or maintain any suit or proceeding knowing the same to be groundless, or
4. To cause another or others to be arrested, charged or indicted for any offense, knowing them to be innocent thereof,

each shall be guilty of conspiracy."

SECTION 2. There is hereby added to chapter 243 of the Revised Laws of Hawaii 1945 a new section 11127.01 to read as follows:

"*Sec. 11127.01. Witnesses' privileges.* No person shall be excused from attending and testifying, or producing any books, papers or other documents, in any proceeding involving a conspiracy before any grand jury, district court or magistrate, or circuit court or judge, upon the ground that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime, or to subject him to a penalty or forfeiture; but no individual shall be prosecuted, or subjected to any penalty or forfeiture, for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that any individual so testifying shall not be exempt from prosecution and punishment for perjury in so testifying."

SECTION 3. Section 11128 of the Revised Laws of Hawaii 1945 is hereby amended to read as follows:

"*Sec. 11128. First degree.* Conspiracy to commit a felony, or to instigate or incite another or others to commit a felony, or to cause another or others to be arrested, charged, or indicted for a felony, knowing them to be innocent thereof, is conspiracy in the first degree, and shall be punished by imprisonment at hard labor for not more than ten years, or by a fine not exceeding ten thousand dollars, or by both such fine and imprisonment; provided, that the punishment for any conspiracy to commit a felony, or to instigate or incite another or others to commit a felony, shall not exceed the punishment that could be given for commission of the felony involved in the conspiracy."

SECTION 4. Section 11129 of the Revised Laws of Hawaii 1945 is hereby amended to read as follows:

"*Sec. 11129. Second degree.* Conspiracy not included in section 11128 is conspiracy in the second degree, and shall be punished by imprisonment for not more than one year, or by a fine of not more than one thousand dollars, or by both such fine and imprisonment; provided, that the punishment for any conspiracy to commit a misdemeanor, or to instigate or incite another or others to commit a misdemeanor, shall not exceed the punishment that could be given for commission of the misdemeanor involved in the conspiracy."

SECTION 5. Sections 11127 and 11130 of the Revised Laws of Hawaii 1945 are hereby repealed.

SECTION 6. If any section, sentence, clause or phrase of this Act, or its application to any person or circumstances, is for any reason held to be unconstitutional or invalid, the remaining portions of this Act, or the application of this Act to other persons or circumstances, shall not be affected. The legislature hereby declares that it would have passed this Act and each section, sentence, clause or phrase thereof, irrespective of the fact that any one or more other sections, sentences, clauses or phrases be declared unconstitutional or invalid.

SECTION 7. This Act shall take effect upon its approval; provided, that this Act shall not affect the liability of any person to prosecution and punishment for the offense of conspiracy committed prior to said effective date and all such offenses may be prosecuted and punished the same as if this Act had not been enacted.

APPROVED this 29th day of August, A.D. 1949.

INGRAM M. STAINBACK,
Governor of the Territory of Hawaii.

APPENDIX VI.

STATUTES OF THE STATES WITHIN THE NINTH JUDICIAL CIRCUIT DEFINING THE OFFENSES OF UNLAWFUL ASSEMBLY, ROUT AND RIOT, OR PROVIDING FOR SUPPRESSION OF RIOTS.

ARIZONA

(From Arizona Code Annotated 1939)

Sec. 43-1303. Riot defined—Penalty.—Any use of force or violence disturbing the public peace, or any threat to use such force or violence, if accompanied by immediate power of execution, by two [2] or more persons acting together, and without authority of law, is a riot. Every person who participates in any riot is guilty of a felony, and punishable by imprisonment in the state prison not exceeding two [2] years, or by fine not exceeding two thousand dollars [$2,000], or both.

Sec. 43-1304. Rout and unlawful assembly defined—Penalty.—Whenever two [2] or more persons, assembled and acting together, make any attempt or advance toward the commission of an act which would be a riot if actually committed, such assembly is a rout. Whenever two [2] or more persons assembled together to do an unlawful act, and separate without doing or advancing toward it, or do a lawful act in a violent, boisterous, tumultuous manner, such assembly is an unlawful assembly. Every person who participates in any rout or unlawful assembly, and every person remaining present at the place of any riot, rout or unlawful assembly, after the same has been lawfully warned to disperse, except public officers and persons assisting them in attempting to disperse the same, is guilty of a misdemeanor.

Sec. 43-1305. Failure of officer to suppress.—Any magistrate or officer, having notice of an unlawful or riotous assembly, who neglects to proceed to the place of assembly,

or as near thereto as he can with safety, and to exercise the authority with which he is vested for suppressing the same and arresting the offenders, is guilty of a misdemeanor.

* * * *[1]

Sec. 43-110. Punishment when not prescribed.—Except when a different punishment is prescribed by this Code, every offense declared to be a felony is punishable by imprisonment in the state prison not exceeding five [5] years, and every offense declared to be a misdemeanor is punishable by imprisonment in a county jail not exceeding six [6] months, or by a fine not exceeding three hundred dollars [$300], or by both. When an act or omission is declared by a statute to be a public offense, and no penalty for the offense is prescribed in any statute, the act or omission is punishable as a misdemeanor.

* * * *

Sec. 45-109. Officers to disperse unlawful assemblies.—Where any number of persons, whether armed or not, are unlawfully or riotously assembled, the sheriff of the county and his deputies, the officials governing the town or city, or the justices of the peace and the constables thereof, or any of them, must go among the persons assembled, or as near to them as possible, and command them, in the name of the state, immediately to disperse. If the people assembled do not immediately disperse, the magistrate and officers shall arrest them, and for that purpose may command the aid of all persons present or within the county.

CALIFORNIA

(From Deering's Penal Code of California 1949)

Sec. 404. "Riot" defined. Any use of force or violence, disturbing the public peace, or any threat to use such force

[1] Indicates that what follows is in a different chapter, article, or part.

or violence, if accompanied by immediate power of execution, by two or more persons acting together, and without authority of law, is a riot.

Sec. 405. Riot, punishment of. Every person who participates in any riot is punishable by imprisonment in the county jail not exceeding two years, or by fine not exceeding two thousand dollars, or both.

Sec. 406. "Rout" defined. Whenever two or more persons, assembled and acting together, make any attempt or advance toward the commission of an act which would be a riot if actually committed, such assembly is a rout.

Sec. 407. "Unlawful assembly" defined. Whenever two or more persons assemble together to do an unlawful act, and separate without doing or advancing toward it, or do a lawful act in a violent, boisterous, or tumultuous manner, such assembly is an unlawful assembly.

Sec. 408. Punishment of rout and unlawful assembly. Every person who participates in any rout or unlawful assembly is guilty of a misdemeanor.

Sec. 409. Remaining present at place of riot, etc., after warning to disperse. Every person remaining present at the place of any riot, rout, or unlawful assembly, after the same has been lawfully warned to disperse, except public officers and persons assisting them in attempting to disperse the same, is guilty of a misdemeanor.

Sec. 410. Magistrates [or officers] neglecting or refusing to disperse rioters. If a magistrate or officer, having notice of an unlawful or riotous assembly, mentioned in this chapter, neglects to proceed to the place of assembly, or as near thereto as he can with safety, and to exercise the authority with which he is invested for suppressing the same and arresting the offenders, he is guilty of a misdemeanor.

* * * *

Sec. 726. Magistrates and officers to command [unlawful assembly or] rioters to disperse. Where any number of persons, whether armed or not, are unlawfully or riotously assembled, the sheriff of the county and his deputies, the officials governing the town or city, or the justices of the peace and constables thereof, or any of them, must go among the persons assembled, or as near to them as possible, and command them, in the name of the people of the state, immediately to disperse.

Sec. 727. To arrest rioters if they do not disperse: Aid of citizens. If the persons assembled do not immediately disperse, such magistrates and officers must arrest them, and to that end may command the aid of all persons present or within the county.

* * * *

Sec. 19. [*Punishment for misdemeanor.*] Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding five hundred dollars, or by both.

IDAHO

(From Idaho Code Annotated 1932)

Sec. 17-3001. Riot defined.—Any use of force or violence, disturbing the public peace, or any threat to use such force or violence, if accompanied by immediate power of execution, by two or more persons acting together, and without authority of law, is a riot.

Sec. 17-3002. Punishment for riot.—Every person who participates in any riot is guilty of a misdemeanor.

Sec. 17-3003. Rout defined.—Whenever two or more persons, assembled and acting together, make any attempt or advance toward the commission of an act which would be a riot if actually committed, such assembly is a rout.

Sec. 17-3004. Unlawful assembly defined.—Whenever two or more persons assemble together to do an unlawful act, and separate without doing or advancing toward it, or do a lawful act in a violent, boisterous or tumultuous manner, such assembly is an unlawful assembly.

Sec. 17-3005. Punishment for rout and unlawful assembly.—Every person who participates in any rout or unlawful assembly is guilty of a misdemeanor.

Sec. 17-3006. Persons present at riots and routs.—Every person remaining present at the place of any riot, rout or unlawful assembly, after the same has been lawfully warned to disperse, except public officers and persons assisting them in attempting to disperse the same, is guilty of a misdemeanor.

Sec. 17-3007. Officers neglecting to suppress riots.—If a magistrate or officer, having notice of an unlawful or riotous assembly, mentioned in this chapter, neglects to proceed to the place of assembly, or as near thereto as he can with safety, and to exercise the authority with which he is invested for suppressing the same and arresting the offenders, he is guilty of a misdemeanor.

* * * *

Sec. 19-224. Commanding rioters to disperse.—Where any number of persons, whether armed or not, are unlawfully or riotously assembled, the sheriff of the county and his deputies, the officials governing the town or city, or the justices of the peace and constables thereof, or any of them, must go among the persons assembled, or as near to them as possible, and command them in the name of the people of the state immediately to disperse.

Sec. 19-225. Arrest of rioters.—If the persons assembled do not immediately disperse, such magistrates and officers

must arrest them, and to that end may command the aid of all persons present or within the county.

* * * *

Sec. 17-113. Punishment for misdemeanor.—Except in cases where a different punishment is prescribed by this code, every offense declared to be a misdemeanor, is punishable by imprisonment in a county jail not exceeding six months, or by a fine not exceeding $300, or by both.

MONTANA

(From Revised Codes of Montana 1935 Annotated)

Sec. 11285. Riot defined. Any use of force or violence, disturbing the public peace, or any threats to use force or violence, if accompanied by immediate power of execution, by two or more persons acting together, and without authority of law, is a riot.

Sec. 11286. Riot, punishment of. Any person who participates in any riot is punishable by imprisonment in the county jail not exceeding two years, or by a fine not exceeding two thousand dollars, or both.

Sec. 11287. Rout defined. Whenever two or more persons, assembled and acting together, make any attempt or advance toward the commission of an act which would be a riot if actually committed, such assembly is a rout.

Sec. 11288. Unlawful assembly defined. Whenever two or more persons assemble together to do an unlawful act, and separate without doing or advancing toward it, or to do a lawful act in a violent, boisterous, or tumultuous manner, such assembly is an unlawful assembly.

Sec. 11289. Punishment of rout and unlawful assembly. Every person who participates in any rout or unlawful assembly is guilty of a misdemeanor.

Sec. 11290. Remaining present at place of riot, etc., after warning to disperse. Every person remaining present at the place of any riot, rout, or unlawful assembly, after the same has been lawfully warned to disperse, except public officers and persons assisting them in attempting to disperse the same, is guilty of a misdemeanor.

Sec. 11291. Magistrate neglecting or refusing to disperse rioters. If a magistrate having notice of an unlawful or riotous assembly, mentioned in this chapter, neglects to proceed to the place of assembly, or as near thereto as he can with safety, and to exercise the authority with which he is vested for suppressing the same and arresting the offenders, he is guilty of a misdemeanor.

* * * *

Sec. 11658. Magistrates and officers to command rioters to disperse. Where any number of persons, whether armed or not, are unlawfully or riotously assembled, the sheriff of the county and his deputies, the officials governing the town or city, or the justices of the peace and constables thereof, or any of them, must go among the persons assembled, or as near to them as possible, and command them in the name of the state immediately to disperse.

Sec. 11659. To arrest rioters if they do not disperse. If the persons assembled do not immediately disperse, such magistrates and officers must arrest them, and to that end may command the aid of all persons present or within the county.

* * * *

Sec. 10725. Punishment of misdemeanor, when not otherwise prescribed. Except in cases where a different punishment is prescribed by this code, every offense declared to be a misdemeanor is punishable by imprisonment in a county jail not exceeding six months, or by a fine not exceeding five hundred dollars, or both.

NEVADA

(From Nevada Compiled Laws 1929)

Sec. 10278. Unlawful Assemblage. §330. If two or more persons shall assemble together to do an unlawful act, and separate without doing or advancing towards it, such persons shall be deemed guilty of an unlawful assembly, and, upon conviction thereof, shall be severally fined in a sum not exceeding two hundred dollars, or imprisoned in the county jail not exceeding three months.

Sec. 10279. Rout and Riot. §331. If two or more persons shall meet to do an unlawful act, upon a common cause or quarrel, and make advances toward it, they shall be deemed guilty of a rout, and, on conviction, shall be severally fined in a sum not exceeding five hundred dollars, or imprisonment in the county jail not more than six months; and if two or more persons shall actually do an unlawful act of violence, either with or without a common cause of quarrel or even do a lawful act, in a violent, tumultuous, and illegal manner they shall be deemed guilty of a riot, and, upon conviction thereof, shall be fined in any sum not exceeding five hundred dollars each or by imprisonment in the county jail for any term of time not exceeding six months, or by both such fine and imprisonment.

* * * *

Sec. 4836. Riotous Assemblage.—Command to Disperse. §87. When six or more persons, whether armed or not, shall be unlawfully or riotously assembled in any city or town, the sheriff of the county and his deputies, the mayor and aldermen of the city, or the constable of the town, and the justices of the peace, shall go among the persons so assembled, or as near as possible, and shall command them, in the name of the people of the United States and the State of Nevada, immediately to disperse.

Sec. 4837. [*Same.*]—*Arrest.—Power of County.* §88. If the persons assembled do not immediately disperse, the magistrates and officers shall arrest them, that they may be punished according to law, and for that purpose may command the aid of all persons present or within the county.

Sec. 4838. Refusing to Use Authority to Suppress Riot.—Penalty. §90. If a magistrate or officer, having notice of an unlawful or riotous assembly, as provided in section 87, neglect or refuse to proceed to the place of assembly, or as near thereto as he can with safety, and to exercise the authority with which he is invested for suppressing the same and arresting the offenders, he shall be deemed guilty of a misdemeanor, and shall be punished accordingly.

OREGON

(From Oregon Compiled Laws Annotated)

Sec. 23-801. Riot and unlawful assembly. Any use of force or violence, or any threat to use force or violence, if accompanied by immediate power of execution, by three or more persons acting together, and without authority of law, is riot. Whenever three or more persons assemble with intent, or with means and preparation to do an unlawful act, which would be riot if actually committed, but do not act towards the commission thereof, or whenever such persons assemble without authority of law, and in such manner as is adapted to disturb the public peace or excite public alarm, or disguised in a manner adapted to prevent them from being identified, such assembly is an unlawful assembly.

Sec. 23-802. Punishment for participating in riot. If any person shall be guilty of participating in any riot, such person, upon conviction thereof, shall be punished as follows:

(1) If any felony or misdemeanor was committed in the course of such riot, such person shall be punished in the same manner as a principal in such crime;

(2) If such person carried, at the time of such riot, any species of dangerous weapon, or was disguised, or encouraged or solicited other persons who participated in the riots to acts of force or violence, such person shall be punished by imprisonment in the penitentiary not less than three nor more than fifteen years;

(3) In all other cases, such person shall be punished by imprisonment in the county jail not less than three months nor more than one year, or by fine not less than $50 nor more than $500.

Sec. 23-806. Dispersal of unlawful or riotous assemblages: Duties of officers: Arrest and punishment of rioters: Commanding aid: Liability for refusal to aid or neglect to exercise authority. When any persons to the number of three or more, whether armed or not, are unlawfully or riotously assembled in any county, city, town or village, the sheriff of the county and his deputies, the mayor of the city, town or village, or chief executive officer or officers thereof, and the justice of the peace of the county for the precinct where the assemblage takes place, or such of them as can forthwith be collected, must go among the persons assembled, or as near to them as they can with safety, and command them in the name of the state of Oregon to disperse. If, so commanded, they do not immediately disperse, the said officer must arrest them or cause them to be arrested, and they may be punished according to law, and for that purpose the arresting officer or officers may command the aid of persons present or within the county, except members of the national guard. If any person so commanded to give such aid shall fail, neglect or refuse to so do, he is deemed one of the rioters, and may be treated and punished accordingly. If any such

officer, having notice of such unlawful or riotous assemblage, shall neglect to exercise the authority with which he is invested, as prescribed in this section, he is guilty of a misdemeanor.

WASHINGTON

(From Pierce Code 1939)

Sec. 9078. Riot Defined. §296. Whenever three or more persons, having assembled for any purpose, shall disturb the public peace by using force or violence to any other person, or to property, or shall threaten or attempt to commit such disturbance, or to do any unlawful act by the use of force or violence, accompanied with the power or immediate execution of such threat or attempt, they shall be guilty of a riot.

Sec. 9079. Penalty. §297. Every person who shall be guilty of riot or of participating therein, by being present at, or by instigation, permitting or aiding the same, shall be punished as follows:

1. If the purpose of the assembly or the acts done therein, or intended by the persons engaged, shall be to resist the enforcement of a statute of this state or of the United States, or to obstruct any public officer of this state or the United States in serving or executing any process or other mandate of a court, or in the performance of any other duty, or if at the time of the riot the offender shall carry a firearm or any other dangerous weapon, or shall be disguised, by imprisonment in the state penitentiary for not more than five years, or by a fine of not more than one thousand dollars.

2. If the offender shall direct, advise, encourage or solicit other persons present or participating in a riot or assembly to acts of force or violence, by imprisonment in the state

penitentiary for not more than two years, or by a fine of not more than one thousand dollars.

3. In every other case, by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars.

Sec. 9080. Unlawful Assembly. §298. Whenever three or more persons shall assemble with intent—

1. To commit any unlawful act by force; or

2. To carry out any purpose in such manner as to disturb the public peace; or

3. Being assembled, shall attempt or threaten any act tending toward a breach of the peace, or an injury to persons or property, or any unlawful act—such an assembly is unlawful, and every person participating therein by his presence, aid or instigation, shall be guilty of a gross misdemeanor.

Sec. 9081. Remaining After Warning. §299. Every person who shall remain present at the place of an unlawful meeting after having been warned to disperse by a magistrate or public officer, unless as a public officer or at the request of such officer he is assisting in dispersing the same, or in protecting persons or property or in arresting offenders, shall be guilty of a misdemeanor.

Sec. 9082. Destruction of Property. §300. Whenever any of the persons so unlawfully assembled shall pull down or destroy any dwelling house or other building, or any shop, steamboat or vessel, he shall be punished by imprisonment in the state penitentiary for not more than five years, or by a fine of not more than one thousand dollars.

Sec. 9083. Disguised and Masked Persons. §301. Any assemblage of three or more persons, disguised by having their faces painted, discolored, colored or concealed shall be unlawful; and every person so disguised present thereat,

shall be guilty of a gross misdemeanor; but nothing herein shall be construed as prohibiting any peaceful assemblage for a masquerade or fancy dress ball or entertainment.

* * * *

Sec. 1799. Duties as Peace Officer — Posse Comitatus. #2769-4. It shall be the duty of sheriffs and of their deputies to keep and preserve the peace in their respective counties, and to quiet and suppress all affrays, riots, unlawful assemblies and insurrection, for which purpose, and for the service of process in civil or criminal cases, and in apprehending or securing any person for felony or breach of the peace, they may call to their aid such persons, or power of their county as they may deem necessary.

* * * *

Sec. 8688. Felonies and Misdemeanors Defined. §1. A crime is an act or omission forbidden by law and punishable upon conviction by death, imprisonment, fine or other penal discipline. Every crime which may be punished by death or by imprisonment in the state penitentiary is a felony. Every crime punishable by a fine of not more than two hundred and fifty dollars, or by imprisonment in a county jail for not more than ninety days, is a misdemeanor. Every other crime is a gross misdemeanor.

APPENDIX VII.

LAWS RELATING TO GRAND JURIES IN THE TERRITORY OF HAWAII.

Hawaiian Organic Act

Sec. 83. Laws continued in force. That the laws of Hawaii relative to the judicial department, including civil and criminal procedure, except as amended by this Act, are continued in force, subject to modification by Congress, or the legislature. The provisions of said laws or any laws of the Republic of Hawaii which require juries to be composed

of aliens or foreigners only, or to be constituted by impaneling natives of Hawaii only, in civil and criminal cases specified in said laws, are repealed, and all juries shall hereafter be constituted without reference to the race or place of nativity of the jurors; but no person who is not a male citizen of the United States and twenty-one years of age and who cannot understandingly speak, read, and write the English language shall be a qualified juror or grand juror in the Territory of Hawaii. No person shall be convicted in any criminal case except by unanimous verdict of the jury. No plaintiff or defendant in any suit or proceeding in a court of the Territory of Hawaii shall be entitled to a trial by a jury impaneled exclusively from persons of any race. Until otherwise provided by the legislature of the Territory, grand juries may be drawn in the manner provided by the Hawaiian statutes for drawing petty juries, and shall sit at such times as the circuit judges of the respective circuits shall direct; the number of grand jurors in each circuit shall be not less than thirteen, and the method of the presentation of cases to said grand jurors shall be prescribed by the supreme court of the Territory of Hawaii. The several circuit courts may subpoena witnesses to appear before the grand jury in like manner as they subpoena witnesses to appear before their respective courts. (48 U.S.C.A. 635.)

Revised Laws of Hawaii 1945

(as amended)

Sec. 9603. Superintendence of inferior courts. The supreme court shall have the general superintendence of all courts of inferior jurisdiction, to prevent and correct errors and abuses therein where no other remedy is expressly provided by law. (L. 1892, c. 57, s. 50; R.L. 1925, s. 2222; R.L. 1935, s. 3592.)

Sec. 9616. Rules for business of courts. For the purpose of expediting any business of the courts in the Territory, in any matter which is not otherwise specifically regulated by law or by any of the general rules hereinabove provided for, and for the purpose of facilitating a speedy and proper administration of justice, the supreme court shall have power to prescribe general rules for the conduct of all business of and the practice in any of the courts of the Territory, which rules shall be effective as of the date fixed by the supreme court. (L. 1939, c. 215, s. 3.)

Sec. 9617. Effect of rules. All general rules made under the provisions of this subtitle shall, when promulgated, have the force and effect of law and shall supersede any statute in conflict therewith. (L. 1939, c. 215, s. 4; am. L. 1941, c. 259, s. 1.)

Sec. 9638. Terms; held when. The terms of the circuit courts shall be as follows: In the first circuit, at Honolulu, on the second Monday of January; in the second circuit, at Wailuku, on the second Monday of January; in the third circuit, at Hilo, on the second Wednesday of January; in the fifth circuit, at Lihue, on the second Wednesday of January. (L. 1892, c. 57, s. 31; am. L. 1895, c. 6, s. 1; am. L. 1903, c. 32, s. 8; am. L. 1905, c. 34, s. 1; am. L. 1905, c. 56, s. 1; am. L. 1907, c. 50, s. 1; am. L. 1911, c. 126, s. 1; am. L. 1917, c. 49, s. 1; am. L. 1919, c. 27, s. 1; am. L. 1921, c. 77, s. 1; R.L. 1925, s. 2244; R.L. 1935, s. 3640; am. L. 1943, c. 141, s. 1 (b).)

Sec. 9791. Qualified when. A person is qualified to act as a juror or grand juror:

1. If he is a male citizen of the United States, and of the Territory, of the age of twenty-one years or over; possesses the qualifications for registration as a voter; has resided in the Territory of Hawaii for not less than three years; is a resident of the circuit from which he is selected; and

2. If he is in possession of his natural faculties and not decrepit; and

3. If he is intelligent, and of good character; and

4. If he can understandingly speak, read and write the English language; and

5. If he is selected, summoned, returned and sworn without reference to race, or place of nativity. (L. 1903, c. 38, s. 1; am. L. 1905, c. 74, s. 1; R.L. 1925, s. 2395; am. L. 1932, 1st, c. 18, s. 1; R.L. 1935, s. 3710; R.L. 1945, s. 9791; am. L. 1945, c. 163, s. 2.)

Sec. 9792. Disqualified when. A person is not competent to act as a juror who does not possess the qualifications prescribed by the preceding section, or who has been convicted of any felony or of a misdemeanor involving moral turpitude. (L. 1903, c. 38, s. 2; R.L. 1925, s. 2396; R.L. 1935, s. 3711.)

Sec. 9793. Exempt when. A person is exempt from liability to act as a juror or grand juror if he is:

1. Over sixty years of age;

2. An attorney-at-law;

3. A salaried officer or employee of the United States, Territory or county;

4. A minister of the gospel, or a priest of any denomination, following his profession;

5. A teacher in a university, college, academy, school, or other place or institution of learning;

6. A practicing physician, surgeon or dentist;

7. An officer, keeper or attendant of an alms-house, hospital or asylum;

8. A person employed on board of a vessel navigating the waters of or between the islands of the Territory, or on board of a vessel engaged in the coasting trade, or plying between any port of the United States and a port in a foreign country;

9. A member of the militia when on active service, or an active member of a fire department of any village, town, city or other place in the Territory. (L. 1903, c. 38, s. 3; am. L. 1913, c. 15, s. 1; R.L. 1925, s. 2397; am. L. 1932, 1st, c. 18, s. 2; R.L. 1935, s. 3712.)

Sec. 9794. Excused when. A juror shall not be excused by a court for slight or trivial cause, but only for serious and unusual hardship or inconvenience to his business, or when material injury or destruction of his property, or of property intrusted to him, is threatened, or when his own health, or the sickness or death of a member of his family, requires his absence. (L. 1903, c. 38, s. 4; R.L. 1925, s. 2398; R.L. 1935, s. 3713.)

Sec. 9795. Affidavit of exemption or excuse. If a person exempt from liability to act as a juror, or entitled to be excused therefrom as provided in sections 9793-9794, be summoned as a juror, he may make and transmit his affidavit to the clerk of the court for which he is summoned. stating his office, occupation or employment, and reason for claiming exemption or excuse; and such affidavit shall be delivered by the clerk to the judge of the court when the name of such person is called, and if sufficient in substance, shall be received as an excuse for non-attendance in person. The affidavit shall then be filed by the clerk. (L. 1903, c. 38, s. 5; R.L. 1925, s. 2399; R.L. 1935, s. 3714.)

Sec. 9796. Panel excused when. Any circuit court or judge may, whenever it shall deem proper and necessary so to do, having regard to the length of the term thereof and equitable distribution of the duties of jurors, excuse any panel or number of jurors, after service, and order another panel or additional jurors to be drawn as nearly as may be as in this chapter provided to complete the business of the term. (L. 1903, c. 38, s. 24; am. L. 1913, c. 5, s. 1; R.L. 1925, s. 2400; R.L. 1935, s. 3715.)

Sec. 9799. Commission; qualifications and commissioners. The judge or judges of each circuit court shall, prior to July 1 of each calendar year, appoint for a period of one year from and after July 1, two citizens as jury commissioners, who shall be voters of the circuit and of good reputation for intelligence, morality and integrity. Such commissioners shall not be members of the same political party. The commissioners, together with the judge of each circuit and, in the first circuit the first judge, shall constitute the jury commission for that circuit. In the absence, disqualification or inability of the first judge of the circuit court, the second or third judge, in the order named, may perform his duties. Should a vacancy occur in the office of a jury commissioner at any time, another commissioner shall be similarly appointed to fill the vacancy. Each jury commissioner shall be allowed for such service such compensation as may be determined by the judge or judges to be just and reasonable, not to exceed two hundred fifty dollars in the first circuit and one hundred dollars in other circuits, payable out of circuit court expense funds. (L. 1903, c. 38, s. 6; am. L. 1905, c. 74, s. 2; am. L. 1923, c. 170, pt. of s. 1; R.L. 1925, s. 2401; am. L. 1932, 1st, c. 18, s. 3; am. L. 1933, c. 111, s. 1; R.L. 1935, s. 3718.) [2]

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[2] Amended by Act 75 of the 1949 Regular Session of the Legislature to read as follows:

"SECTION 1. Section 9799 of the Revised Laws of Hawaii 1945 is hereby amended to read as follows:

" 'Sec. 9799. Commission; qualifications and commissioners. The judge or judges of each circuit court shall, prior to July 1 of each calendar year, appoint for a period of one year from and after July 1, three citizens as jury commissioners, who shall be voters of the circuit and of good reputation for intelligence, morality and integrity. One of such citizens so appointed shall be a clerk of the circuit court. Any such jury commissioner may be removed by the appointing power for any reason deemed sufficient by such appointing power. Not more than two commissioners shall be members of the same political party. The three citizens so appointed shall constitute the jury commission for that circuit. Should a

Sec. 9800. Duty to make list, etc. The jury commission of each circuit shall in each year make and file with the clerk of the circuit court at least ten days before the next term of court two certified, separate lists of citizens to serve respectively as grand and trial jurors in the circuit court for the ensuing year. It shall select and list the names of one hundred citizens as trial jurors and fifty citizens as grand jurors, except that in the first circuit six hundred and fifty trial jurors and seventy-five grand jurors and in the third circuit two hundred fifty trial jurors and fifty grand jurors shall be selected and listed. If in any of the circuits the jury commission shall not be able to select the number required by this section for jurors, it shall select the highest number practicable.

All of such selections shall be citizens whom the respective commissions believe, after careful investigation in each case, to be qualified and not exempt under the provisions of this chapter. If practicable, no person shall be selected who has served as a juror or grand juror within one year. All of such selections shall be made without reference to the political affiliations or to the race or place of nativity of citizens, with a view to obtain lists representative of the qualified citizenry of each circuit.

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vacancy occur in the office of a jury commissioner at any time, another commissioner shall be similarly appointed to fill the vacancy. Each jury commissioner, except the clerk of court appointed to the commission, shall be allowed for service on the jury commission such compensation as may be determined by the judge or judges to be just and reasonable, not to exceed two hundred and fifty dollars in the first circuit and one hundred dollars in other circuits, payable out of circuit court expense funds. Any powers granted by this section to the judges of the first circuit may, by order signed by a majority of such judges, be delegated to any one or more of such judges'."

"SECTION 2. This Act shall take effect upon its approval but shall have no effect upon jury lists made prior to such effective date by jury commissioners then duly appointed and qualified."

The judge serving on the jury commission may at any time, for reasons appearing sufficient to him, order the dissolution of any list of grand or trial jurors and the discharge of the persons named thereon, and upon the entry of such order the jury commission shall make and file with the clerk of the circuit court within such time as the judge shall direct another list of grand or trial jurors, which may include any of the persons so discharged, to serve for the remainder of the year. (L. 1903, c. 38, s. 7; am. L. 1905, c. 74, s. 3; am. L. 1923, c. 170, pt. of s. 1; R.L. 1925, s. 2402; am. L. 1932, 1st, c. 18, s. 4; am. L. 1933, c. 111, s. 2; R.L. 1935, s. 3719; am. imp. L. 1943, c. 141; am. L. 1945, c. 149, s. 1.)

(Sec. 9800.01.) Section 1. (Limitation on selection.) No person shall be selected and listed as a grand juror who has been so selected and listed within one year; and no person shall be selected and listed as a trial juror who has been so selected and listed within one year. (L. 1945, c. 163, s. 1.)

Sec. 9801. Commission; power to summon for examination. The commission may in its discretion, by circuit court process issued by the circuit judge member of the commission, summon before it for examination prospective jurors or grand jurors. A person so summoned for examination shall receive mileage as provided in section 9797. (L. 1932, 1st, c. 18, s. 5; R.L. 1935, s. 3720.)

Sec. 9802. Regular jurors, serve one year. The persons whose names are selected, listed and returned, as aforesaid, by the jury commission, as shown by the certificate thereof filed with the clerk of the court, shall be known as "regular jurors" and shall serve one year and until other persons are selected, listed and returned as jurors in manner aforesaid. (L. 1903, c. 38, s. 9; am. L. 1923, c. 170, pt. of s. 1; R.L. 1925, s. 2403; R.L. 1935, s. 3721.)

Sec. 9803. Drawing grand jury; trial jury; except first circuit. The clerk shall file such certified lists at least ten days before the next term of court, write the names contained in such lists on separate pieces of paper of the same size and appearance, fold each piece so as to conceal the names thereon, and deposit the pieces containing the names of persons selected as grand jurors and trial jurors respectively in appropriate boxes to be called the grand jury box and the trial jury box respectively. He shall then in the presence of the judge, after first shaking the grand jury box so as to thoroughly mix the pieces therein contained, draw therefrom by lot the names of not less than thirteen nor more than twenty-three persons to serve as grand jurors, and in the same manner from the trial jury box the names of not less than eighteen nor more than twenty-six persons to serve as trial jurors at the ensuing term; provided, that in the first circuit the first judge may direct that the grand jury be drawn and summoned to appear before any judge designated by him; and provided further that in the first circuit the trial jurors shall be drawn and summoned as prescribed in section 9804 and not as set forth in this section or in section 9807. A certificate containing lists of the names of persons thus drawn as grand and trial jurors respectively, and a true statement of all the essential facts of such drawings, signed by the judge and attested by the clerk, shall then be filed; provided, that no drawing of grand jurors or trial jurors need be made for any term, if in the opinion of the judge, it is unnecessary. Such drawings shall be made in public after at least one week's publication of notice of the time and place of the same, in a newspaper of general circulation, printed and published within the circuit within which the drawings shall take place, if there is such a newspaper printed and published in the circuit, otherwise after one week's posting of such notice in at least three conspicuous places in the circuit. (L. 1903, c. 38, s. 8; am. L. 1905,

c. 74, s. 4; am. L. 1907, c. 80, s. 1; am. L. 1923, c. 170, pt. of s. 1; R.L. 1925, s. 2404; R.L. 1935, s. 3722.)

Sec. 9810. Impaneling. At the opening of any term of the circuit court for which a grand jury has been ordered and summoned, unless otherwise directed by the court or a judge thereof, and as often thereafter as to the court or a judge may seem proper, a grand jury may be impaneled. At the time when the order for the grand jurors is returnable, or as soon thereafter as convenient, the clerk, under the direction of the court, shall call the names of those summoned, and the court may then hear excuses of jurors summoned. (L. 1905, c. 38, s. 15; R.L. 1925, s. 2411; R.L. 1935, s. 3729.)

Sec. 9811. Charging. The grand jury, being impaneled and sworn, shall be charged by the court. In doing so, the court shall give them such information as it may deem proper as to their duties and as to the law pertaining to such cases as may come before them. The court may further charge the jury when the necessity arises. (L. 1903, c. 38, s. 16; R.L. 1925, s. 2412; R.L. 1935, s. 3730.)

Sec. 9812. Challenging. Before the grand jury is sworn, the prosecuting officer, or any person held to answer a charge for a criminal offense may challenge the panel, or an individual juror, for cause to be assigned to the court. All such challengers shall be tried and determined by the court. The clerk shall then enter upon the jury roll the names of jurors present, not excused and sworn to serve upon the panel. (L. 1903, c. 38, s. 17; am. L. 1905, c. 74, s. 8; R.L. 1925, s. 2413; R.L. 1935, s. 3731.)

For Rule 18 of the Rules of the Supreme Court of the Territory of Hawaii, as amended February 14, 1947, and March 27, 1947, see No. 12301, R. R. 73-78.

APPENDIX VIII.

AFFIDAVIT OF RHODA V. LEWIS, ASSISTANT ATTORNEY GENERAL, RE "SUGGESTION FOR INCORPORATION IN THE RECORD ON APPEAL OF CERTAIN MATTERS OF RECORD IN THIS COURT," FILED IN THE UNITED STATES DISTRICT COURT JUNE 23, 1949 (R. 558-564).

TERRITORY OF HAWAII,
CITY AND COUNTY OF HONOLULU } ss.

RHODA V. LEWIS, being first duly sworn on oath deposes and says: That she is the duly appointed, qualified and acting Assistant Attorney General of the Territory of Hawaii and as such is of counsel for the appellants Walter D. Ackerman, Jr., Attorney General of Hawaii, and Jean Lane, Chief of Police of the County of Maui, in Nos. 12300 and 12301 in this Court.

That on June 23, 1949, in the course of preparation of the record in said cases affiant filed in the United States District Court a "Suggestion for Incorporation in the Record on Appeal" of certain matters in said United States District Court, supported by an affidavit and by confirmation by the clerk of said court (R. 558-564). That at that time the Honorable Delbert E. Metzger was in California on a judicial assignment, and that affiant wrote to Judge Metzger on June 24, 1949, enclosing a copy of the material so filed, and indicating that affiant would endeavor to agree with opposing counsel on an appropriate form of order. Counsel having been unable to agree, the matter was discussed by affiant with Judge Metzger following the return of Judge Metzger to the district, and affiant then advised Judge Metzger of her desire to make an appointment with Judge Metzger and opposing counsel, at the earliest opportunity, both counsel being then constantly engaged in the

United States District Court in Civil No. 930. That following the completion of the said hearings in Civil No. 930 affiant applied for an appointment with Judge Metzger which was obtained for October 3, 1949, that on said date affiant consulted with Judge Metzger in the presence of opposing counsel as to the disposition of affiant's Suggestion for Incorporation in the Record on Appeal, and that Judge Metzger declined to consider the matter in the absence of Judge Biggs and Judge Harris.

That subsequently, on October 10, 1949, the court of its own motion filed an order and supplement to the record on appeal (R. 1993-2001).

RHODA V. LEWIS.

Subscribed and sworn to before me
this 27th day of December, 1949.

(Seal) LOUISE N. COCKETT,
Notary Public, First Judicial
Circuit, Territory of Hawaii.

My commission expires January 22, 1953.

[Filed with the Clerk of the United States Court of Appeals for the Ninth Circuit on December 29, 1949.]